SUPREME COURT U. S.

IN THE

Supreme Court of the United States

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October Term 1967

No. 990

In the Matter of the Estate of
MARCELLUS LINDSEY JOSLYN, also known as MARCELLUS L. JOSLYN, and as M. L. JOSLYN,
Deceased.

MARCELLUS N. JOSLYN,
Petitioner,

vs.

COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, at Los Angeles and ROBERT D. MacDONALD, individually and as Executor of the Last Will of MARCELLUS L. JOSLYN, Deceased,
Respondents.

BALDO M. KRISTOVICH, Public Administrator, ILSE, AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY,
Respondents.

MARCELLUS N. JOSLYN,
Petitioner,

vs.

COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA; MERRITT L. JOSLYN, MARY C. PARKER CURRIVAN, RONALD MERRITT JOSLYN, JOY LOUISE MacNULTY, JOYLON DAVID JOSLYN, THEODOE NEWELL JOSLYN, CELIA ALICE PARKER, M. WESLEY PARKER, III, MARCELLUS JOSLYN PARKER, ALICE JOSLYN, WILLIAM DWIGHT JOSLYN, PENNY IRENE JOSLYN, MARCELLUS LeFEVRE JOSLYN MARINA ELAINE JOSLYN, LOIS E. MENDENHALL, MRS. MARY R. SHOFF CAREY, ROBERT F. DOLAN, BALDO M. KRISTOVICH, Public Administrator, ILSE AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY, and ROBERT D. MacDONALD, individually and as Executor of the Last Will of MARCELLUS L. JOSLYN, Deceased,
Real Parties in Interest.

Petition for a Writ of Certiorari Directed to the Court of Appeal, Second Appellate District, State of California.

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SUBJECT INDEX

	Page
Jurisdiction	2
Statutes and Constitutional Provisions Involved	3
Opinion Below	3
The Facts	4
Questions Presented by This Writ	13
Reasons for Granting the Writ	16

INDEX TO APPENDICES

Appendix 1. Fourteenth Amendment	1
Appendix A. Statutes Involved	2
Appendix B. Admission of Will to Probate	8
Appendix C. Minutes of May 11, 1967	9
Appendix D. Certificate	10

TABLE OF AUTHORITIES CITED

Cases

Beaufort Concrete Co. v. Atlantic States Construction Co., 384 U.S. 1004, 16 L. Ed. 2d 1008 .....17, 21

Boyd v. United States, 116 U.S. 616 .....7, 17, 25

Chambers v. Florida, 309 U.S. 227 28

Cole v. Arkansas, 33 U.S. 196, 92 L. Ed. 644 15

Hovey v. Elliott, 167 U.S. 409 .....7, 12, 17, 24

Link v. Wabash Railroad Co., 370 U.S. 626, 8 L. Ed. 2d 734 .....18, 19

Mooney v. Holohan,294 U.S. 103 .....9, 15, 28

Rothrock, In re, 14 Cal. 2d 34 28

Societe Internationale pour Participations Industrielles v. Rogers, 357 U.S. 310, 2 L. Ed. 2d 1255 .....9, 12, 17,

Surowitz v. Hilton Hotel Corporation, 383 U.S. 363, 15 L. Ed. 2d 807 .....24, 26

United States v. Sorrento, 175 F. 2d 721 12

Rules

Federal Rules of Civil Procedure, Rule 23 26

Rules of the Supreme Court, Rule 21 2

Rules of the Supreme Court, Rule 22 2

Rules of the Supreme Court, Rule 23 2

Rules of the Supreme Court, Rule 23(f) 2

Statutes Page.

California Code of Civil Procedure, Sec. 2016(a) .. 3
California Code of Civil Procedure, Sec. 2030 3
California Code of Civil Procedure, Secs. 2030-2034(3) 13
California Code of Civil Procedure, Sec. 2034 3
.....5, 8
California Code of Civil Procedure, Sec. 2034(3) ... 7
.....8, 9, 13, 14, 28
California Code of Civil Procedure, Sec. 2034(iii) 3, 5, 7
California Probate Code, Sec. 370 3
California Probate Code, Sec. 374 3
California Probate Code, Sec. 380 .....3, 13
California Probate Code, Sec. 385 3
California Probate Code, Sec. 1200 20
California Probate Code, Sec. 1230 3
California Probate Code, Sec. 1233 3
California Probate Code, Sec. 1240 3
California State Constitution, Art. I, Sec. 1 9
United States Code, Title 28, Sec. 1257(3) 2
United States Constitution, Fifth Amendment 9, 17
United States Constitution, Fourteenth Amendment 2, 3, 7, 8, 9, 11, 12, 13, 14, 15, 17, 18, 19, 20, 28

Textbook

Louisell, Modern California Discovery, p. 354 9

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Real Parties in Interest.

Petition for a Writ of Certiorari Directed to the Court of Appeal, Second Appellate District, State of California.

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Comes now Marcellus N. Joslyn and petitions this Honorable Court for a writ of certiorari directed to the Court of Appeal, Second Appellate District of the State of California to review and reverse an order and judgment of that court denying a petition to recall the remittitur from a dismissal of an appeal from a will contest involving a $15,000,000 estate for alleged failure of the petitioners and will contestant to comply with a pretrial order of discovery and thus arbitrarily to approve the faulty will and thus to take property rights away from petitioner in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, the property rights of inheritance of his share of his father's $15,000,000 estate to which he would be entitled to one fourth and rights to his mother's testamentary trust of $2,500,000. The Supreme Court of California on September 7, 1967 denied a hearing from the order of the California Court of Appeal denying recall of the remittitur.

Justice William O. Douglas extended time to file this petition for certiorari to January 6, 1968. California procedure provides for such recall of remittitur (see petition to Recall Remittitur, Points and Authorities).

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1257-(3), United States Code, and Rules 21, 22 and 23, particularly 23(f) of this Court.

Judgment of the Court of Appeal of the State of California, Second Appellate District, Division 2 refus-

ing to recall the remittitur on the ground contended for by Petitioner that the failure to do so was violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States was rendered on July 27, 1967. [R. page immediately after the grey covered printed petition to recall the remittitur]. Petition for hearing from this denial was duly and regularly filed in the Supreme Court of California. That court denied a hearing September 7, 1967. [R. page following petition for hearing.]

This petition for writ of certiorari is being filed within 90 days of the order denying a hearing of the same, and an extension of time by Hon. Justice William O. Douglas to January 6, 1968.

Statutes and Constitutional Provisions Involved.

The statutes involved are contained in Appendix A, to wit: Sections 370, 374, 380, 385, 1230, 1233 and 1240 of the Probate Code of California, and Sections 2016(a), 2030 and 2034, and 2034(iii) Code of Civil Procedure of California. The Fourteenth Amendment to the United States Constitution.

Opinion Below.

Neither the Court of Appeal nor the Supreme Court published an opinion. There was merely an order denying the motion to augment the record and an order arbitrarily and capriciously dismissing the appeal in the Court of Appeal. The Supreme Court of California denied a hearing without opinion September 7, 1967 from the petition to recall the remittitur.

The Facts.

Your petitioner is the son of Marcellus L. Joslyn, a manufacturer of telephonic equipment, who left an estate on his death valued at $15,000,000 and who, in a will filed for probate in which the document and date appears altered, named a lawyer, who was also his tax adviser, business associate and secretary, as the executor of the $15,000,000 estate and the research of certain residual benefits. By the terms of the said will, this young lawyer, tax adviser, business associate and secretary also became the testamentary trustee of fifteen $1,000,000 trusts of fifteen grandchildren, for which he receives compensation of 3 per cent per trust per annum and is given sole and exclusive discretion and power to operate and run these trusts.

Under the terms of the will of Alice N. Joslyn, the trustee of the Alice Newell Joslyn testamentary trust, who was her husband, had power to appoint a successor trustee by his own will and pursuant to such power he also purportedly appointed Robert D. MacDonald, the young lawyer, as such successor trustee of the Alice Newell Joslyn testamentary trust, which involved being trustee of another $2,500,000 in property with its attendant fees.

The will on its face appears unnatural in that it excludes the children of the decedent from any financial benefits. It also appears altered as to the date of its execution.

Under California law a will drawn by an attorney who is financially benefited presumably is the product of undue influence.

Your petitioner filed a will contest prior to probate. On advice of his then attorney, who later became a fed-

eral appellate judge, petitioner dismissed the will contest prior to probate in order to give ample time as requested by this attorney for preparation of the will contest. California law permits filing of a will contest after probate if the pre-probate will contest was not tried. Later he filed a will contest after probate which was the subject of many attempts—ultimately successful—to knock out the post probate will contest on its merits by means of unanswered requests for discovery under Section 2034(iii) of the Code of Civil Procedure and for alleged failure by petitioner to comply with such requested discovery.

Petitioner had given 5 days of deposition testimony from 9 a.m. to 5 p.m. prior to the admission of the will to probate.

Although the probate practice is governed by the Probate Code and is only governed by Part 2 of the Code of Civil Procedure when not covered by the Probate Code, nevertheless, many attempts were made to obtain late discovery just before trial and a motion was made to dismiss petitioner's will contest on the basis of failure to comply with Section 2034 of the Code of Civil Procedure, and again grant discovery at the late date requested.

At the time of the hearing on the motion, Mr. Joslyn's then attorney, Phill Silver, had an application before the California Court for a protective order authorized by California law and other proceedings which had not been passed upon by the Court. No testimony was taken by the trial court at the hearing on the motion to dismiss petitioner's will contest on October 5, 1966 as to his good faith in his various contests nor as to whether the presumption of undue influence which

covered the lawyer-trustee was overcome by testimony of any kind. Instead, the trial judge arbitrarily and without testimony granted a motion to dismiss the post probate *will* contest.

The notice of motion was to dismiss the *will contest,* not the amended will contest which was filed after demurrer to the will contest. The court nevertheless later granted a motion without further notice or hearing or proceedings to dismiss the $15,000,000 *amended* will contest, the amendment being the result of the trial court having sustained demurrers to the pleadings which was followed by subsequent amendments to conform to the trial court's requirements of amending the pleadings. Nevertheless, the trial judge arbitrarily dismissed the amended will contest and made purported findings without testimony and without a hearing.

The result of such proceeding was to penalize the contestant, the eldest son of the decedent, to the extent of his proportionate share of the $15,000,000 estate and also to act as executor of the will of his deceased mother and to direct and handle the estate of his mother, another $2.500,000 penalty.

Then counsel for the petitioner did not pay the filing fee in time in the Court of Appeal from the order of dismissal, but was later granted relief by the Court of Appeal on April 5, 1967 and under the law would then have had until May 5 to file his opening brief and would not actually be in default until June 4, without any further extensions and providing a card notice had been sent pursuant to the rules of the court.

Petitioner had paid the filing fees twice, but had at no time received notice of the time when the opening brief was due or advised that he might be in default.

There was pending on appeal from an order seeking a protective writ of mandate from the appellate court to prevent the taking of any discovery which had not been acted on when the trial judge nevertheless arbitrarily and capriciously dismissed the will contest.

Thus, penalties have been imposed upon the petitioner herein to the extent of his share of the $15,000,000 from the father's estate and $2,500,000 from his mother's estate by a denial of a right to be heard under the amended will contest and based arbitrarily on alleged failure to comply with Section 2034(3) of the Code of Civil Procedure of California.

The questions involved here are whether a state judge may arbitrarily dismiss an amended will contest without notice or granting a hearing on the merits of the same, thus taking away the property of the petitioner to the extent of more than $3,500,000 and other rights (his fourth), as a penalty, without violating due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and whether the statute (Section 2034 (iii) C.C.P. of California) inherently and as construed and applied in this case, which allows *pro confesso* to take property as a confession of judgment is arbitrary and carpricious and in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and as laid down as early as *Boyd v. United States,* 116 U.S. 616, and again repeated in *Hovey v. Elliott,* 167 U.S. 409.

Three days before the trial was to start on the merits, to-wit: October 5, 1965, pursuant to the notice of trial previously served on the petitioner herein that his trial was to start on October 6, 1965, later post-

poned to October 8, plaintiff, through influential counsel, was able to get the trial judge arbitrarily to dismiss the post probate will contest and thus terminate the litigation without a trial on the merits and solely because of litigation alleged violation of Code of Civil Procedure, Section 2034(3).

Petitioner appealed the decision and the appeal was dismissed and the Supreme Court upheld the dismissal without a hearing. In none of the events has the petitioner had his day in court on the absolutely authorized will contest. Thus, the rules of discovery of Section 2034 of the Code of Civil Procedure, Subsection (3), became a booby trap for petitioner and his then counsel in which the plaintiff, through more influential counsel, was able to confiscate petitioner's property rights to determine, under the will, whether he is entitled to one-fourth of the $15,000,000 estate and, in turn, entitled to become one of the trustees of the testamentary trusts under his mother's estate because of the voiding of the power of appointment under the will.

Petitioner thus challenged the constitutionality of Section 2034(3) of the Code of Civil Procedure of the State of California, inherently and as construed and applied in this case, in a petition to recall the remittitur, which petition is a part of the record in this case. In this petition, the petitioner herein first challenged the constitutionality of the procedure and proceedings under the Fourteenth Amendment to the Constitution of the United States. It is contained in the grey covered document that is a part of the record herein.

On page 22 of the said document, the petitioner denied that there had been a wilful refusal to grant

discovery in any respect whatsoever. Even if there were refusal of discovery, which we deny, the sanctions provided by the California Legislature are constitutionally limited to effectuate its objects, namely, to secure discovery and not to penalize the litigant or to forfeit property to which he is entitled. The right to receive property in an estate is a right which is guaranteed by Article I, Section 1 of the Constitution of the State of California and the Fourteenth Amendment to the Constitution of the United States. (See: Louisell, Modern California Discovery, p. 354; and the limits of discovery in Fifth and Fourteenth Amendments; *Societe Internationale pour Participations Industrielles v. Rogers,* 357 U.S. 310, 2 L. Ed. 2d 1255.)

Your petitioner prays that this court order that the remittitur be recalled because of denial of due process of law guaranteed by the 14th Amendment U.S. Constitution and that his right to have a trial on the merits of the amended will contest be restablished.

The petition to recall the remittitur was denied July 27, 1967 by the Court of Appeals, Second Appellate District, State of California, Division Two. Thereafter, a petition for hearing in the Supreme Court, which petitioner was again heard by the Supreme Court on its claim of the unconstitutionality under the 14th Amendment U.S. Constitution of Section 2034(3), Code of Civil Procedure of California, inherently and as construed and applied in this case, and also as to a false statement having been made to the court by attorneys for the plaintiff that there was no certificate of readiness filed (*Mooney v. Holohan,* 294 U.S. 103) as an additional basis for the recall of the remittitur and said petition for hearing was denied by the Supreme

Court on September 7, 1967. This petition for writ of certiorari is being filed within 90 days of said denial and on extension granted by Justice Wm. O. Douglas to January 6, 1968.

The amended will contest in this case involves determination of valuable rights of the children of whom petitioner is one—the oldest son of decedent and involved the question of undue influence which California presumes exists in the case of an attorney who writes a will in which he benefits, as the evidence in this case shows the executor-attorney would benefit in this case.

On July 22, 1965 attorney Ernest J. Zack, signed and filed a certificate of readiness for trial, a copy of which is contained in the petition to Recall the Remittitur. Under California law and rules of trial, no further discovery was supposed to take place after the certificate of readiness is filed unless special leave of court was obtained, which it was not in this case.

Thereafter, without such leave of court, attorney Zack attempted to conduct further discovery proceedings and was met with the objections by petitioner's then attorney that the further taking of depositions and other proceedings was for the purpose of harassment and that the petitioner was not required to answer any further questions. Petitioner acted on advice of counsel. Petitioner's then attorney filed a petition for a protective order, alleging that a certificate of readiness had been filed by attorney Zack. Attorney Zack in a declaration under penalty of perjury denied that such a certificate was filed and a copy is enclosed as Appendix D to the petition to recall the remittitur, page 13.

The Supreme Court of California, in denying petitioner a hearing, acted with this false denial before it.

Further, the arbitrary dismissal by the court as of October 5, 1965, three days before trial was of the "will contest". Without any further notice or hearing other proceeding, on the amended will contest, however, the judge dismissed what was really an amended will contest, the amendment having been filed after a demurrer had been sustained to the will contest with leave to amend. Nevertheless, the trial court, without the taking of any testimony as to good faith on the part of petitioner or any other proceedings, then arbitrarily and capriciously and in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States dismissed the *amended* will contest and deprived petitioner of a trial *on its merits*. Unless this Court reverses the orders and judgments below, petitioner will be deprived of his day in court on the right given by California law to contest the validity of his father's purported last will, distributing nothing but furniture and bric-a-brac of little value to the children—the natural objects of his bounty, and a $15,000,000 estate to others.

When the case got to the Court of Appeal, then counsel for the petitioner herein (the appellant there) relied on his then attorney, to whom he had paid a fee of $1000 in advance (R. 4) with an understanding that he would timely get up and file an opening brief on appeal, but petitioner was unaware that a hearing was to be held to dismiss his appeal because of his asserted neglect of his then attorney, Mr. Bonaparte, the result of which would deprive your petitioner of his day in court.

Unless this Court recalls the remittitur and reverses the judgment below petitioner will be barred forever on the very important amended will contest involving himself and his brothers and sister to the extent of an estate of $15,000,000 of his father and a $2,500,000 of his mother. Your petition was on the record in person (*in propria persona*) at the time of the motion to dismiss the appeal in place of his former attorney and was entitled to statutory notice and a hearing on the court's intention to substitute the name of the former attorney into the case and hear the motion to dismiss the appeal in the absence of your petitioner, who was on the record *in propria persona* and without a direct notice to him. This deprived him of notice and an opportunity to be heard, the very first essential of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. (See: *Societe Internationale pour Participations Industrielles v. Rogers,* 357 U.S. 197, 211, 2 L. Ed. 2d 1255.)

The appellate court after arbitrarily substituting in the former attorney did vacate the default of the attorney but did not even wait until the time had expired for filing the opening brief but dismissed the appeal on the summary motion of influential counsel for the respondent.

Even in *United States v. Sorrento,* 175 F. 2d 721, the court said failing to allow the petitioner to proceed on his appeal penalized the defendant here for the omissions of his former attorney and visited the sins of his attorney upon the petitioner. This, we urge, violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Hovey v. Elliott, 167 U.S. 409.

Questions Presented by This Writ.

1. Whether the petitioner has been denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States where his post probate amended will contest, authorized by the laws of the State of California (Section 380 Probate Code of California), has been stricken three days prior to trial because of alleged failure to answer questions at a deposition hearing subsequent to a certificate of readiness being filed and that he failed to serve and file answers to interrogatories requested after the certificate of readiness was filed by defendant and under the discovery procedure of Sections 2030-2034(3) of the Code of Civil Procedure of the State of California, and while an appeal was pending from the denial of a protective order.

2. Whether a statute of a state, which authorizes the striking of a party's pleadings and denial of a trial on the merits of his claim for his share of a $15,000,-000 estate to which he would be entitled if he proved the will invalid, is unconstitutional and void under the Fourteenth Amendment to the United States Constitution where it authorizes summary proceedings of striking a complaint for alleged failure to comply with discovery statutes of the state, to-wit: Section 2034 (3) of the Code of Civil Procedure of the State of California.

3. Whether a state may forfeit and deprive a person of his property or his property rights arbitrarily and capriciously and without a hearing on the merits for alleged failure, if it occurred, to comply with discovery proceedings and thus strike the plaintiff's complaint attacking the validity of his aged father's will for presumptive undue influence, age and informities

and other reasons and deny him a trial on the merits of his claims of the will's invalidity before a jury authorized by law of a state without violating due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

4. Whether a Section 2034(3) of the Code of Civil Procedure of the State of California, inherently and as construed and applied in this case, is violative of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and does it permit the taking of property arbitrarily and capriciously and without a hearing on the merits in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

5. Whether the arbitrary denial of an amended will contest, on its merits before a jury, provided for by the laws of a state, is a denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and whether a state, or a judge, thereof may dismiss such a post probate amended will contest arbitrarily and capriciously without a hearing on the merits of the post probate amended will contest and thus deprive a petitioner, the eldest son and other children, the natural object of the bounty of a decedent, of his and their share of a $15,000,000 estate of his father and the right to the appointment as trustee of the testamentary trust in the $2,500,000 estate of his mother.

6. Whether a dismissal of an *amended* will contest, based solely upon a dismissal of a *will* contest, which

will contest was demurred to and *amended* in a subsequently authorized pleading, was a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States where there was no further hearing on the amended will contest and no notice or opportunity to petitioner or his attorney to be present at the proceeding dismissing the amended will contest, whether such proceeding is in violation of the law laid down in *Cole v. Arkansas,* 333 U.S. 196, 92 L. Ed. 644.

7. Whether a false statement to a State Supreme Court that a certificate of readiness has not been filed and upon which that court acts in denying a hearing so fatally infects the fairness and decision of that hearing as to require this Court to reverse the judgment and order below and to remand the case for further consideration upon that basis alone. (*Mooney v. Holohan,* 294 U.S. 103, 79 L. Ed. 791.)

8. Whether a will has been truly and regularly admitted to probate where no foundation was laid for the testimony of the witnesses to the will and where the statutory presumption of undue influence and fraud on the part of the writer of the will, an attorney who benefits from it, has been overcome and whether the hearing at the time that the will was later admitted, to-wit: April 29, 1964, was conducted without notice or hearing on its then admission and whether the procedure therein without notice and a hearing at that time violated due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Reasons for Granting the Writ.

This is another one of the cases in which the courts under the new "discovery" procedure which have invaded our courts have been acting arbitrarily and capriciously like Russian Tyrants and Ho Chi Minh in denying a hearing to a litigant on the merits, thus denying statutory lights to contest a will before a jury, and to have a jury determine the property rights of the children of a decedent.

The respondents just will not come to the conference table of justice before a jury to determine the validity of petitioner's aged father's will in a trial on the merits. They have used the booby trap of "discovery" proceedings and have so far avoided trial on the merits. A hearing by this court will set justice right.

Petitioner herein is the eldest son of the decedent and one of those who would be entitled to his bounty if the will was declared null and void as the result of undue influence, improper admission or many other reasons. Nevertheless, petitioner was denied his day in court for obeying his then attorney and declining to submit again to deposition hearing and interrogatories after he had already granted five days or deposition or hearing and interrogatories in the pre-probate proceeding involving the identical subject matter and involving the identical issues.

This Court should grant a hearing to hold that these discovery statutes cannot be used as booby traps for litigants, that influential counsel cannot persuade judges who are persuaded by their standing to dismiss arbitrarily and thus deprive a litigant of his property rights which are inherent in the properties involved in a will and thus to deny a litigant his day in court.

This Court now has the opportunity in this case to lay down the law that the purpose of "discovery" may be to aid in speeding litigation but is not a means or a tool or device of taking away property or property rights arbitrarily and capriciously; that such procedure violates due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

This Court has, as early as *Boyd v. United States,* 116 U.S. 616, held that a statute which provides for arbitrary confiscation of property is a violation of due process of law under the Fifth Amendment to the Constitution of the United States. The same provisions have been upheld by this Court in *Hovey v. Elliott,* 167 U.S. 409, 42 L. Ed. 215. Again, this Court has commented extensively on the fact that such proceedings may be a violation of due process of law under the Fifth and Fourteenth Amendments. (*Societe Internationale pour Participations Industrielles v. Rogers,* 357 U.S. 197, 2 L. Ed. 2d 1255.

Mr. Justice Black in *Beaufort Concrete Co. v. Atlantic States Construction Co.,* 384 U.S. 1004, 16 L. Ed. 2d 1008 (June 20, 1966), in a lengthy dissenting opinion, pointed out that there was a growing number of cases in which the Federal Rules of Civil Procedure had been used to prevent the fair and just determination of a lawsuit on the merits. (16 L. Ed. 2d 1019.)

The same situation now exists among the states and in this case. It is time that this Court laid down its proper rule of law guiding the various states of the county that such a procedure is, in fact, unconstitutional and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States; that to deny one who has, in effect, a

property right in the subject matter of the litigation cannot be denied his day in Court by the trick and device of his purported failure to respond to discovery in the form that the other party seeks to have it. This case squarely raises the question that discovery was granted at great length in the early stages of the proceedings; that discovery was sought after a certificate of readiness had been filed by defense counsel, who would benefit from the arbitrary dismissal of the amended will contest and a failure to hear it on the merits. This proceeding, has been upheld throughout all of the courts of the State of California, although its right to do so has been challenged under the due process clause of the Fourteenth Amendment to the Constitution of the United States under our petition to recall the remittitur in the Court of Appeal of the State of California, Second Appellate District, Division Two, in the Supreme Court of California, and in the Supreme Court of the State of California, which denied a hearing of the same.

The petitioner was represented by counsel at the last hearing at which he attended and answered some of the questions but declined to answer others on the ground of harassment (he having given five days of deposition testimony earlier), now is faced with dismissal of his amended will contest involving the validity of his aged father's will written by an attorney employed by his father and presumptively under California law the result of undue influence wherein the attorney benefits widely from the contents of the will.

We ask this Court also to re-examine and reverse its holding in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 8 L. Ed. 2d 734, where it, in effect, held the sin of the

lawyer fell upon the client in a dismissal of a diversity negligence action under circumstances there presented where the error was based upon the error of the attorney and not of the client.

Like the expression of Judge Schnackenberg in his dissent to the opinion of the majority for the Seventh Circuit upholding the dismissal in *Link v. Wabach,* when he said

> "The order now affirmed has inflicted a serious injury upon an injured man and his family who are innocent of any wrongdoing. Plaintiff's cause of action . . . was his property. It has been destroyed. The District Court to punish a lawyer has confiscated another's property without process of law which offends the Constitution. . . . Because it was neither necessary or proper to visit the sin of the lawyer upon his client I would reverse." (291 F. 2d 542, 548).

Here, too, the orders of the court below dismissing the post probate will contest (and denying prohibition and mandate) have inflicted a serious injury upon the petitioner, Marcellus N. Joslyn. His cause of action was his property. It has been destroyed. The California courts, who have punished what was claimed to be a failure of discovery under the statute, have now confiscated his property without due process of law, which offends the due process clause of the Constitution of the United States. We contend that state does not have such a constitutional authority. Under the 14th Amendment U.S. Constitution it is not proper, constitutional or necessary to visit the advice, if wrongful, and the sins of the lawyer upon his client nor to

arbitrarily and capriciously take away a valid cause of action of a post-probate amended will contest.

The order of Superior Court Judge Wright in dismissing the post probate amended will contest was not based upon any testimony taken at the time of the dismissal. No testimony was taken regarding the good faith of the petitioner nor were any other sanctions attempted to be imposed such as contempt and to give him a further opportunity to purge himself of that contempt. The dismissal was arbitrarily granted on the motion of the attorneys who moved to dismiss the "will contest" but later the judge entered an order with purported findings of fact and conclusions of law not based upon any testimony upon the amended will contest, without any notice or hearing of the same and in violation of the requirements of Section 1200 of the California Probate Code requiring notice thereof.[1] The whole proceeding was an arbitrary and capricious action in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This Court has, in the last few years, had many occasions to determine the great shift in the practice of law and whether so-called discovery under the new rules of federal procedure as well as under state procedure constitute a booby trap for lawyers and their clients and by means of alleged unanswered discovery to strike pleadings and deprive litigants of their day in court, and a trial by a jury of peers on the merits.

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[1]Since that time an intermediate appellate court in another Joslyn case has held the notice provision of Section 1200 of the California Probate Code are mandatory. *Joslyn v. Security First National Bank.* (Unpublished opinion Division 5, Second Appellate District.)

In this respect, Mr. Justice Black said in *Beaufort Concrete Co. v. Atlantic States Construction Co.,* 384 U.S. 1004, 16 L. Ed. 2d 1018, 86 S. Ct. 1908, a federal case, as follows:

> "I would grant certiorari in this case. This is another in a growing number of cases in which the Federal Rules of Civil Procedure have been used to prevent the fair and just determination of a lawsuit on the merits. See, e.g., Lord v. Helmandollar, 348 F.2d 780, cert denied, 383 US 928, 15 L ed 2d 847, 86 S Ct 929, Black, J., dissenting; Riess v. Murchison, cert denied, 383 US 946, 16 L ed 2d 209, 86 S Ct 1196, Black, J., dissenting; Link v. Wabash R. Co., 370 US 626, 8 L ed 2d 734, 82 S Ct 1336, Black, J., joined by The Chief Justice, dissenting. In this case I think the summary judgment entered against petitioner by the District Court and affirmed by the Court of Appeals should be reversed and the case remanded to the District Court so that petitioner can have his day in court. The facts in summary are these. Petitioner supplied respondent with concrete to built some docks and warehouses near Savannah, Georgia. When respondent did not pay for all the concrete supplied, petitioner brought this suit to recover the balance, about $90,000. Respondent moved for summary judgment supporting its motion with several affidavits stating that a large portion of petitioner's concrete was defective. On the day set for hearing petitioner filed three affidavits with the court which asserted that the concrete furnished was not defective and that if it was it became so because respondent's agent had

ordered it to be watered down. The District Court, however, refused to consider petitioner's affidavits on the ground that they had not been served 'prior to the day of hearing' as provided by Rule 56(c) of the Federal Rules, and on the basis of the pleadings and respondent's affidavits alone, the court entered summary judgment for respondent. The Court of Appeals affirmed stating that under the Federal Rules the trial court had broad discretionary power either to accept or reject petitioner's untimely affidavits but that the court did not abuse its discretion in rejecting the affidavits. The Court of Appeals went on to state that 'Without the excluded affidavits, little is left to the plaintiff's case—nothing in fact, but the bare allegation in the complaint that [plaintiff] furnished adequate concrete for which it was not fully paid.' Thus for the delay of a few hours—less than one day—in serving affidavits on respondent's counsel, petitioner was deprived of all opportunity to have the court consider its affidavit evidence, which if true, would have entitled it to collect the $90,000 balance for the concrete supplied.

I find it entirely at odds with a fair system of trying lawsuits to throw out a litigant's case because his lawyer for negligence or some other reason fails by less than 24 hours to satisfy one of many procedural time limits. From the beginning to the end of a lawsuit a lawyer must meet a host of time limits for filing papers. Surely a judge should not have discretion to enter final judgment at will every time a slight lapse occurs which may delay for half a day or so the service of one of a

multitude of papers that must be served during the trial and appeal of a law suit.

The summary judgment entered below indicates, in my opinion, a failure to appreciate that 'The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion.' Surowitz v Hilton Hotels Corp., 383 US 363, 373, 15 L ed 2d 807, 814, 86 S Ct 845. If the Federal Rules, as the Court of Appeals holds, repose in the district courts discretion to deprive parties of a full trial on their claims in circumstances like these, then it indicates to me that these rules exalt strict obedience to formality and 'paper work' high above the fair and just trial of lawsuits. Nevertheless, the Federal Rules have been administered this way time and again. As I pointed out in my dissent to the new Federal Rules recently adopted:

Cases coming before the federal courts over the years now filling nearly 40 volumes of Federal Rules Decisions show an accumulation of grievances by lawyers and litigants about the way many trial judges exercise their almost unlimited discretionary powers to use pretrial procedures to dismiss cases without trials. In fact, many of these cases indicate a belief among many judges and legal commentators that the cause of justice is best served in the long run not by trials on the merits but by summary dismissals based on out of court affidavits, pretrial depositions, and other pretrial techniques. 384 US 1034, 15 L 2d 2d lxxvi.

'The filing of court papers on time is, of course, important in our court system. But lawsuits are

not conducted to reward the litigant whose lawyer is most diligent or to punish the litigant whose lawyer is careless. Procedural paper requirements should never stand as a series of dangerous hazards to the achievements of justice through a fair trial on the merits.'"

Earlier, Mr. Justice Black had urged this Court to heed to the language of *Hovey v. Elliott,* 167 U.S. 409, which is quoted herein, also *Surowitz v. Hilton Hotel Corporation,* 383 U.S. 363, 15 L. Ed. 2d 807.

In *Hovey v. Elliott,* 167 U.S. 409, this Court said:

"The demonstration of the unsoundness of the contention that courts of equity have claimed and exercised the power to suppress an answer and thereupon render a decree *pro confesso,* which results from the foregoing review of the authorities, is strengthened by the reflection that if such power obtained, then the ancient common law doctrine of 'outlawry,' and that of the continental systems as to 'civil death', would be a part of the chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen.

'It being therefore clear that the supreme court of the District of Columbia did not possess the power to disregard an answer which was in all respects sufficient and had been regularly filed, and to ignore the proof taken in its support, the only question remaining is whether a judgment based upon the exercise of such an assumed power is void for want of jurisdiction, and may therefore be collaterally attacked. It cannot be doubted that where a judgment is rendered without the issuance

> and service of summons against a party who did not enter an appearance, the court rendering it is without jurisdiction ot do so, and it can be assailed as void whenever presented as a muniment of right against another. Looking at the substance and not the form of the decree in the case of *Hovey v. McDonald,* 109 U. S. 150 [27:888], upon which the rights of the plaintiff in error depend, it is plain that the judgment was substantially one without a hearing, for of what efficacy or avail was the summons to appear when the court which issued the summons rendered its judgment upon the theory that the summons was inefficacious, and that the defendant had no right either to appear to be heard in his defense? As said by this court in *Postal Teleg. Cable Co. v. Adams,* 155 U. S. 689 [39:312, 5 Inters. Com. Rep. 1]: 'The substance, and not the shadow, determines the validity of the exercise of the power.'"

As early as *Boyd v. United States,* 116 U.S. 616, this Court has ruled against arbitrary judgments by which property could be taken *pro confesso* and without due process of law. That decision has been the landmark case for all cases since that time. There has been a great shift of procedure in connection with attempting to eliminate cases by summary judgments and by taking default or striking pleadings and on the basis of lack of discovery. These proceedings, we respectfully submit, pervert instead of advance justice and increase the necessity of litigants going to higher courts and filling the higher courts with plenty of appeals in an endeavor to protect themselves and to get rights they have been arbitrarily and carpriciously denied.

The effect of this Court's denial of a hearing would be to deprive the natural children of the bounty of the decedent and of their rightful share of the property he left behind. It would validate a will which on its face appears to have an altered date and which was written by an attorney whom the laws of the State of California say makes the document presumptively the result of undue influence.

It is therefore important that this Court grant a hearing herein and set at rest for all of the states of the country the limit to which this type of sanctions in respect to discovery can go and to protect litigants on the basic rights of American justice to have a trial on the merits and before juries.

In *Surowitz v. Hilton Hotel Corporation,* 383 U.S. 363, at 373, 15 L. Ed. 2d 808, at 814, the Court said:

> "If the rules of procedure work as they should in an honest and fair judicial system they not only permit but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits."

It refers to Rule 23 of the Federal Rules of Civil Procedure but its language is comparable here, that this rule, like the other civil rules, was written to further, not defeat, the ends of justice. A serious fraud is charged here. As in that case, petitioner here should have been permitted to prove his charges of undue influence and other charges made in his post probate amended will contest which were prepared by an able probate lawyer and verified under oath and should not have been dismissed just three days before the trial was ready to start on its merits and thus to deprive not only

a trial on its merits but a jury trial which the law requires in will contests in California.

This Court has spoken of the denial of rights to poor litigants who cannot afford depositions and discovery as compared with those who can. However, there is another class of litigants who are able to secure able and influential counsel in the case. Thus, victory goes to the influential, not to the just. It is like trial by battle in olden days. Although this is a country of laws, it is administered by men and men are naturally subject to influences of friendship and associations that may well turn the tide and aid in victory in a lawsuit where the decision as here, is arbitrary and capricious. It thus secures results without a trial on the merits and without a trial before a jury, as authorized and required by law to be had, and as the one means of the protection of all citizens. No better means than the jury system, has been evolved in dealing with equal justice. In this particular case, the respondent's counsel of record at the time of the dismissal was a very able lawyer who secured the dismissal and who shortly thereafter became a Superior Court judge in Los Angeles County. Another member of the firm of these very able and influential lawyers was the son of a Supreme Court justice of California who now is also a Superior Court judge. Thus, this firm has had much more than money could achieve. It has had personal and highly successful influence in achieving its objecting and in securing a dismissal of the amended will contest of this out of state client. We pray for recall of the remittitur by order of this court [2nd Civil No. 31472] and for remand of the case for trial on the merits.

Our attack here on the judgment of dismissal is a direct attack on the judgment and proceedings below. A judgment obtained in violation of due process of law is a nullity and void. *In re Rothrock,* 14 Cal. 2d 34; *Chambers v. Florida,* 309 U.S. 227; *Mooney v. Holohan,* 294 U.S. 103. In a separate proceeding we made a collateral attack on this judgment by writ of prohibition and mandate and any other appropriate remedy. This was also denied and a petition for writ of certiorari is being filed separately with this court this day.

We ask for our day in court before a jury on the merits of the amended will contest. We ask this Court to hold that Section 2034(3) of the Code of Civil Procedure of California, inherently and as construed and applied in this case, is in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States in respect to the facts of this case and that the case be remanded to the state courts for trial before a jury on the merits of the amended will contest.

Respectfully submitted,

MORRIS LAVINE, ESQ.,
Attorney for Petitioner Marcellus N. Joslyn.

APPENDIX 1.

AMENDMENT XIV.

1. ; nor shall any state deprive any person of life, liberty or property without due process of law.

APPENDIX A.

Statutes Involved.

Section 370, Probate Code of California, Contests Before Probate:

"§ 370. *Filing contest; citation; demurrer; answer*

"Any person interested may contest the will by filing written grounds of opposition to the probate thereof at any time before the hearing of the petition for probate, and thereupon a citation shall be issued directed to the heirs of the decedent and to all persons interested in the will, including minors and incompetents, wherever residing, directing them to plead to the contest within 30 days after service of the citation, which shall be made personally or by publication in the manner provided by law for the service of summons in civil actions. Any person so served may demur to the contest upon any of the grounds of demurrer available in civil actions. If the demurrer is sustained, the court may allow the contestant a reasonable time, not exceeding 10 days, within which to amend his contest. If the demurrer is overruled, the petitioner and others interested within 10 days after the receipt of written notice thereof, may jointly or separately answer the contest."

Section 374, Probate Code of California, Contests Before Probate:

§*374. Perpetuation of testimony*

"The testimony of each subscribing witness who has testified must be reduced to writing, signed by him and filed, and shall be admissible in evi-

dence in any subsequent contest of the will if the witness has died or has permanently removed from the state."

Section 380, Probate Code of California, Contests After Probate:

"*§380. Parties who may contest after probate; limitation of time; petition*

"When a will has been admitted to probate, any interested person, other than a party to a contest before probate and other than a person who had actual notice of such previous contest in time to have joined therein, may, at any time within six months after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate be revoked."

Section 1230, Probate Code of California, Rules of Procedure:

"*§1230. Trial rules; judgments*

"All issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions. The party affirming is plaintiff, and the one denying or avoiding is defendant. When a party is entitled to a trial by jury and a jury is demanded, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice, must settle and frame the issues to be tried. If no jury is demanded, the court must try

the issues joined, and sign and file its decision in writing, as provided in civil actions. Judgment on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions."

Section 1233, Probate Code of California, Rules of Procedure:

"§*1233. Applicability of Code of Civil Procedure Part 2; evidence in uncontested proceedings; evidence of subscribing witnesses*

"Except as otherwise provided by this code or by rules adopted by the Judicial Council, the provisions of Part 2 of the Code of Civil Procedure[1] are applicable to and constitute the rules of practice in the proceedings mentioned in this code with regard to trials, new trials, appeals, and all other matters of procedure.

Section 1240, Probate Code of California, Rules of Procedure:

"§ *1240. Appealable orders*

"An appeal may be taken to the Supreme Court from an order granting or revoking letters testamentary or of administration; admitting a will to probate or revoking the probate thereof; . . ."

Section 2016(a), Code of Civil Procedure of California:

"§ *2106. Depositions pleading action*

Text of section until Jan. 1, 1967

Section 2034, Code of Civil Procedure of California:

"§*2034. Refusal to make discovery; consequences*

"*(b) (1) Refusal to obey subpoena or order; contempt.* The court may punish as a contempt

(i) the refusal of any person to obey a subpoena issued by that court to attend a deposition or to be sworn as a witness, or (ii) the refusal of any person to attend a session of court (either personally or by his attorney) after having been directed to attend in the manner provided in subdivision (a) of this section, or (iii), the refusal of any person to obey any order made by the court under subdivision (a) of this section.

"*(2) Other consequences.* If any party or person for whose immediate benefit the action or proceeding is prosecuted or defended, or an officer, director, superintendent, member, agent, employee or managing agent of any such party or person refuses to obey an order made under subdivision (a) of this section, or if any party or any officer or managing agent of a party refuses to obey an order made under Sections 2019, 2061 or 2062 of this code, the court may make such orders in regard to the refusal as are just, and among others the following:

"(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contests of the paper, or the physical or mental or blood condition of the person sought to be examined, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order:

"(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items

of testimony, or from introducing evidence of the physical or mental or blood condition of the person sought to be examined;

"(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

"(iv) An order requiring the disobedient party or the attorney advising such disobedience to pay to the party obtaining an order under this section the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees.

"(v) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental or blood examination;

"(vi) Where a party has failed to comply with an order under subdivision (a) of Section 2032 of this code requiring him to produce another for examination, such orders as are listed in (i), (ii), and (iii) of this subdivision of this section, unless the party faling to comply shows that he is unable to produce such person for examination.

"*(c) Expenses on refusal to admit.* If a party, after being served with a request under Section 2033 of this code to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any

such matter of fact, he may apply to the court in the same action for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. If the court finds that there were no good reasons for the denial and that the admissions sought were of substantial importance, the order shall be made.

"*(d) Failure of party to attend or serve and file answers.* If a party or a person for whose immediate benefit the action or proceeding is prosecuted or defended or anyone who at the time the deposition is set is an officer, director, or managing agent of any such party or person willfully fails to appear before the officer who is to take his deposition, after said party or his attorney has been served with a proper notice in accordance with the provisions of subdivision (a) (4) of Section 2019 of this code, or if a party or an officer or managing agent of a party willfully fails to serve *and file* answers to interrogatories submitted under Section 2030 of this code, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party, or impose such other penalties of a lesser nature as the court may deem just, and may order that party or his attorney to pay to the moving party the reasonable expenses in making such motion, including reasonable attorney's fees."

APPENDIX B.

Admission of Will to Probate.

Superior Court of the State of California, for the County of Los Angeles. Dept. 64.

Date: 3-31-64.

Newcomb Condee Judge.

R. D. Gaddis Deputy Sheriff.

P. N. Bowen, Deputy Clerk.

B. Wallace Reporter.

Estate of Marcellus L. Joslyn, etc., Dec'd. 471 032.

NATURE OF PROCEEDINGS:

Matters continued to this date:

(Petn. Probate Will, etc.; Contest) come on for hearing, with counsel appearing as before. Contestant moves for dismissal of his contest, pursuant to his written Request for Dismissal, heretofore filed. Motion is resisted by proponent. After argument, the Court denies said motion. Contestant's motion for a further continuance is denied.

Mary R. Shoff Carey, Margaret J. Middlewood, Mary Hottle and Robert D. Macdonald are sworn and testify for proponents.

The Court finds that prima facie proof of the will has been made and that the will should be admitted to probate. Contestant offers no evidence.

Will is admitted to probate, (date June 29, 1962), Letters Testamentary to issue to Robert D. Macdonald as Executor. Bond $15,000,000/30,000,000. Counsel is directed to prepare findings and decree accordingly.

P. N. Bowen.

APPENDIX C.

In the Court of Appeal of the State of California, Second Appellate District.

Minutes of May 11, 1967.

Division Two.

Estate of Joslyn, Civil No. 31472.

The Court:

Motion to augment record denied. Motions to dismiss appeals are granted.

APPENDIX D.

Superior Court of the State of California for the County of Los Angeles. Department 9.

Court convened at 1:30 P.M. Oct. 5, 1965, present Hon. Donald R. Wright, Judge; W. J. Mason, Deputy County Clerk; L. White, Deputy Sheriff; W. H. Davis, Reporter; and the following proceedings were had:

328-471032 JOSLYN, MARCELLUS L., etc.
Not of mo for ord dismissing Will Contest & for other appropriate relief C.C.P. 2434; Memo of Pts & auth. & declaration in support thereof; Declaration in support of & ord shortening time

2-C 10/1—3

Attorney (s): Kindel & Anderson

Petition Granted.

SUBJECT INDEX

Page

I.

Questions Actually Presented by the Petition 2

II.

Statement 2

A. The Background Facts 2

B. Post-Probate Will Contest Proceedings in the Trial Court 6

C. Post-Probate Will Contest Proceedings in the Appellate Courts (2nd Civ. No. 31472) 11

D. Petitioner's Original Appellate Proceedings in Case Designated LA 29505 15

III.

Reasons for Denying the Writ 16

A. No Substantial Federal Question Was Raised in the State Courts in Time to Be Properly Considered and Decided 16

B. The Decisions of the State Courts on the Petition to Recall the Remittitur Were Based on Adequate Non-Federal Grounds 21

C. Petitioner Was in No Way Denied Due Process of Law by the Courts of the State of California 23

(i) Section 2034 of the California Code of Civil Procedure, as Written, and as Applied to the Facts of the Case at Bar, Comports With Existing Constitutional Principles 23

Page

(ii) No Fraud, Extrinsic or Otherwise, Was Practiced on the Trial Court, on the Appellate Courts or on Petitioner 28

(iii) Petitioner Was Given Every Reasonable Opportunity to Be Heard on the Merits of His Claims 30

IV.

Conclusion 34

INDEX TO APPENDICES

Appendix 1. Exhibit "G" 1

Appendix 2. Findings of Fact, Conclusions of Law and Order Dismissing Amended Will Contest After Probate 11

Appendix 3. Declaration of Service of Motion to Dismiss Appeals 13

Appendix 4. Appellate Rules Involved 14

TABLE OF AUTHORITIES CITED

Cases	Page
American Surety Co. v. Baldwin, 287 U.S. 156	18
Apra v. Aureguy, 55 Cal. 2d 827	18
Barbour v. Georgia, 249 U.S. 454	17
Beck v. Washington, 369 U.S. 541	16
Crummer v. Beeler, 185 Cal. App. 2d 851	20
Cunningham, Estate of, 148 Cal. App. 2d 8	17
Damiani v. Albert, 48 Cal. 2d 15	18
Dimmick v. Dimmick, 58 Cal. 2d 417	18
Durley v. Mayo, 351 U.S. 277	22
Edelman v. California, 344 U.S. 357	17
El Paso & Southwestern R.R. Co. v. Eichel & Weikel, 226 U.S. 590	20
Everly Enterprises, Inc. v. Altman, 54 Cal. 2d 761	18
Fong v. United States, 300 F. 2d 400, cert. denied, 370 U.S. 938	25
Godchaux v. Estopinal, 251 U.S. 179	16
Grayson v. Harris, 267 U.S. 352	23
Hammond Packing Co. v. Arkansas, 212 U.S. 322	24, 25
Hanson v. Denckla, 357 U.S. 235	16
Hershey v. Reclamation Dist. No. 108, 200 Cal. 550	18
Hovey v. Elliott, 167 U.S. 490	27
Isenberg v. Sherman, 214 Cal. 722	19
Jenner v. City Council, 164 Cal. App. 2d 490	18

Page

Loeber v. Schroeder, 149 U.S. 588 20

Lund v. Superior Court, 61 Cal. 2d 698 19

Lynch v. N. Y. ex rel. Pierson, 293 U.S. 52 21

Market St. Ry. Co. v. Railroad Comm'n., 324 U.S. 548 14

McGarrity v. Delaware River Bridge Comm'n., 292 U.S. 19 18

Mutual Life Ins. Co. v. McGrew, 188 U.S. 291 17

Peitzman v. Illmo, 141 F. 2d 956 25

Radio Station WOW v. Johnson, 326 U.S. 120 18

Rowland v. Kreyenhagen, 24 Cal. 52 19

Societe Internationale pour Participations Industrielles v. Rogers, 357 U.S. 197 27

Stembridge v. Georgia, 343 U.S. 541 22

Unger v. Los Angeles Transit Lines, 180 Cal. App. 2d 172 26

Rules

California Rules of Court, Rule 16 11

California Rules of Court, Rule 17 11

California Rules of Court, Rule 24 12

California Rules of Court, Rule 27 13

California Rules of Court, Rule 28 13

California Rules of Court, Rule 41 17

Rules of the United States Supreme Court, Rule 23(f) 22

Rules of the United States Supreme Court, Rule 40 22

Statutes

	Page
California Code of Civil Procedure, Sec. 2009	10
California Code of Civil Procedure, Sec. 2015.5	10
California Code of Civil Procedure, Sec. 2016-2036	7
California Code of Civil Procedure, Sec. 2034	2, 10, 14, 26, 35
California Probate Code, Sec. 1200	33
United States Code, Title 28, Sec. 2101(c)	14
United States Constitution, Fifth Amendment	14, 15
United States Constitution, Fourteenth Amendment	14, 15

Textbooks

4 Moore's Federal Practice (2d Ed.), Sec. 37.03, p. 2805	26
Robertson & Kirkham (Wolfson & Kurland ed. 1951), Jurisdiction of the Supreme Court, p. 141	20
3 Witkin, California Procedure (1954), pp. 2370-2373	14

IN THE

Supreme Court of the United States

October Term 1967
No. 990

In the Matter of the Estate of
MARCELLUS LINDSEY JOSLYN, also known as MARCELLUS L. JOSLYN, and as M. L. JOSLYN,
Deceased.

MARCELLUS N. JOSLYN,
Petitioner,

vs.

COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, at Los Angeles and ROBERT D. MacDONALD, individually and as Executor of the Last Will of MARCELLUS L. JOSLYN, Deceased,
Respondents.

BALDO M. KRISTOVICH, Public Administrator, ILSE, AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY,
Respondents.

MARCELLUS N. JOSLYN,
Petitioner,

vs.

COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA; MERRITT L. JOSLYN, MARY C. PARKER CURRIVAN, ROLAND MERRITT JOSLYN, JOY LOUISE MacNULTY, JOYLON DAVID JOSLYN, THEODORE NEWELL JOSLYN, CELIA ALICE PARKER, M. WESLEY PARKER, III, MARCELLUS JOSLYN PARKER, ALICE JOSLYN, WILLIAM DWIGHT JOSLYN, PENNY IRENE JOSLYN, MARCELLUS LeFEVRE JOSLYN MARINA ELAINE JOSLYN, LOIS E. MENDENHALL, MRS. MARY R. SHOFF CAREY, ROBERT F. DOLAN, BALDO M. KRISTOVICH, Public Administrator, ILSE AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY, and ROBERT D. MacDONALD, individually and as Executor of the Last Will of MARCELLUS L. JOSLYN, Deceased,
Real Parties in Interest.

Brief for Respondents in Opposition.

I.
QUESTIONS ACTUALLY PRESENTED BY THE PETITION.

1. Whether a substantial federal question was presented to a state court in a timely and proper manner and there preserved as an issue.
2. Even assuming that a substantial federal question was properly raised, whether it was necessary for the state court to determine such a question.
3. Whether, in any event, the dismissal of petitioner's post-probate will contest was consonant with existing federal constitutional principles justifying legislation such as Section 2034 of the California Code of Civil Procedure, as written, or as applied to the facts of the case at bar.

II.
STATEMENT.

It is necessary for respondents to set forth in some detail the facts as established by the record because of the confusing and unsubstantiated statements made by petitioner in his Petition for Writ of Certiorari which may give this Court a serious misimpression of the case.

A. The Background Facts.

Marcellus L. Joslyn died on June 30, 1963, in the County of Los Angeles. His descendants included four children and fifteen grandchildren. One of his children is the petitioner, Marcellus N. Joslyn. His probate estate, before taxes, approximated $15,000,000.00. With the exception of his household and personal effects, he left the great residue of his estate to his fifteen grandchildren to be held in trust for them and their de-

scendants. *Ample provision had previously been made for all of the children, including the petitioner, through the establishment of inter-vivos trusts and the testamentary trust to the decedent's wife, Alice N. Joslyn.*

As early as 1935, the decedent and his wife established two *inter-vivos* trusts which regularly distributed large sums of income to the children. Following the death of Alice N. Joslyn in 1949, a testamentary trust was created by the terms of her will which substantially augmented the income being received by the children. From these sources the petitioner had been receiving in excess of $100,000.00 annually, and the income has been consistently increasing to the point where currently the petitioner has been receiving in excess of $225,000.00 per year.

Having already provided for the care and comfort of his children, the decedent, for state and federal tax reasons and other considerations, decided to bypass the children in favor of the grandchildren, including the children of the petitioner.[1]

For reasons which have not been made clear, the petitioner remained estranged from the rest of his family and did not in fact visit with the decedent for a period exceeding ten years prior to the decedent's death. The petitioner maintained his residence in Texas, while the decedent and other relatives resided in California

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[1]While it is true, as petitioner states, that Robert D. MacDonald was a business associate and tax advisor of the decedent, Marcellus L. Joslyn, it is not true that he receives 3% of the trust estate as petitioner implies. Petition for a Writ of Certiorari at 4. The Will of Marcellus L. Joslyn, deceased, discloses that Mr. MacDonald receives only 3% of the annual *net* income of the trust estates created by this will as a trustee's fee. *See* Appendix I to Petition to Recall the Remittitur. This fee, of course, is less than that charged by most institutional trustees.

(*See* Declaration of Robert D. MacDonald in Support of Respondents' Motion to Dismiss Appeals in 2nd Civ. No. 31472, at 7-12).[2]

Soon after the decedent's death, the petitioner came to Los Angeles and engaged the services of a firm of attorneys to make an investigation including a review of the decedent's business and personal records. The estate representatives prepared and filed a petition for probate of the will and the hearing on the petition was postponed at the request of the petitioner's attorneys because of the investigation in progress. After the hearing on the petition had been postponed for several weeks, and shortly before the date of hearing, the petitioner's attorneys were discharged or withdrew, and within a matter of hours, another attorney prepared and filed a pre-probate will contest (*See* MacDonald Declaration, *supra,* at 13-15). The contest alleged various grounds for invalidating the will, including alleged conspiracy, fraud and undue influence.

The petitioner soon thereafter secured new counsel (the firm of Hansen & Dolle), and counsel for the proponents of the will scheduled the deposition of the petitioner. The petitioner appeared and was interrogated concerning the allegations he had made in his pre-probate will contest. In all material respects, he admitted that he had no basis in fact for the will contest (*See* Appendix 1 hereto which is a true copy of an excerpt from this deposition as certified within the record in 2nd Civ. No. 31472 and set forth as

[2]All record references herein are to parts of the record certified to the Supreme Court of the United States in Cases Numbered 990, October Term 1967, and 991, October Term 1967.

Exhibit "G" to the "Opposition to Application for Augmentation of Record, etc.").

Soon thereafter, the petitioner discharged the firm of Hansen & Dolle as his counsel of record and thereafter for several months appeared *in propria persona.* The trial of his pre-probate will contest was duly scheduled, but on March 9, 1964, the petitioner appeared, *in propria persona,* before Judge Newcombe Condee, Judge of the Los Angeles Superior Court, and requested a continuance of the trial. The court at that time noted that there were "less than statutory grounds for continuance" but nevertheless granted the continuance "with the understanding that the matter would be tried at that time either with an attorney or in pro per., for the moving party." (*See* Minute Order, Clerk's Transcript, 2nd Civ. No. 31472, at 40).

On March 26, 1964, without notice to opposing parties, the petitioner, *in propria persona,* filed a Request for Entry of Dismissal (*See* Clerk's Transcript, 2nd Civ. No. 31472, at 41). On March 31, 1964, when the contest was called for trial, the clerk informed the trial court that a dismissal had been "filed downstairs" (*See* Reporter's Transcript, Exhibit "F", p. 3 to the Petitioner's Petition filed with the Supreme Court of California, in LA 29505, hereinafter referred to simply as LA 29505).

Initially, the trial court was not inclined to regard the dismissal as effective and directed that the trial proceed as though the petitioner were still a party to the proceeding (*See* Exhibit "F", Petition in LA 29505). The proponents of the will, in accordance with the previous notices of the hearing, proceeded to present proof that the will had been executed by a testator having

testamentary capacity, and that the other prerequisites existed for the execution of a valid will. The contestant remained at the hearing but refused to participate in the proceedings (*See* Exhibit "F"; pp. 1, 2, 15, 20, 23, Petition in LA 29505). The trial court found that a *prima facie* showing had been made justifying admission of the will to probate.

Thereafter, before the formal findings and order were signed, the petitioner once again secured new counsel, the firm of Ely, Kadison & Quinn. On April 24, 1964, his new counsel appeared before the trial court (Judge Condee) to discuss the proposed findings and to argue that the dismissal as filed by his client was effective notwithstanding the court's refusal to recognize it as such. The trial court was persuaded to recognize that a voluntary dismissal by the petitioner was proper, leaving open thereby the possibility of a post-probate will contest. By orders made on April 29, 1964, the will was admitted to probate and the dismissal by the petitioner was recognized, *nunc pro tunc,* as having been effective (*See* Clerk's Transcript, 2nd Civ. No. 31472, at 42).

B. Post-Probate Will Contest Proceedings in the Trial Court.

Shortly before the expiration of the six-month period allowed for a post-probate contest, the petitioner filed a contest in the Los Angeles Superior Court in Action No. P-471,032, renewing essentially all of the allegations made in his pre-probate pleading (*Compare* the Contest as reported at 22 of Clerk's Transcript in 2nd Civ. No. 31472 *with* Contest of Will after admission to probate at 44 of the same transcript).

The petitioner in his contest made no allegation concerning the absence of any opportunity to appear and contest the admission of the will to probate. Of course, such an allegation could not be seriously advanced because of his active participation at all stages in the proceedings prior to and at the time of the admission of the will to probate.

Because the petitioner had indicated in the deposition proceeding during the pre-probate period that he was investigating and seeking to secure evidence concerning the validity of the will, the estate representatives considered it a matter of vital concern that further discovery be obtained to determine whether the petitioner had to any extent succeeded in his quest for evidence. Accordingly, during the period from January of 1965 until the eventual dismissal of the post-probate contest in October of 1965, various discovery proceedings were initiated by the estate representatives pursuant to the discovery statutes of the State of California (California Code of Civil Procedure, Sections 2016-2036).

The petitioner's refusal to abide by the discovery statutes has been documented in a summary form in the conclusions of law as formally made and filed by the Los Angeles Superior Court in Action No. P-471,032. These conclusions of law were certified as part of the Clerk's Transcript in 2nd Civ. No. 31472 and, in pertinent part, are as follows:

CONCLUSIONS OF LAW

1. Defendants were entitled to discovery from Contestant in defense of the Amended Will Contest after Probate.

2. All notices pertaining to any discovery matters or hearings in connection therewith were given as required by law or if not so given were waived by Contestant. All rulings in any hearings pertaining to discovery in the Contest after Probate which were required to be incorporated into attorney orders were signed promptly and served on Contestant's attorney within reasonable times prior to the hearings or matters to which they related.

3. Contestant refused willfully and otherwise to obey an Order of this Court fixing the date and time for the taking of his deposition. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(b)(2)(iii).

4. Contestant willfully failed to appear at his deposition on September 1 after proper notice thereof. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(d).

5. Contestant willfully failed to appear at his deposition on September 20 after proper notice thereof. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(d).

6. Contestant willfully failed to serve and file answers to properly served interrogatories submitted under Code of Civil Procedure Section 2030. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(d).

7. Contestant refused willfully and otherwise to obey an Order of this Court made under Section 2031 of the Code of Civil Procedure. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(b)(2)(iii) (Clerk's Transcript, 2nd Civ. No. 31472, at 1172-73).

These conclusions of law were amply supported by detailed findings of fact which have been included as an appendix to this Brief in Opposition. *See* Appendix 2.

The motion to dismiss the post-probate contest which eventually led to the order of dismissal was filed on September 20, 1965, and although initially scheduled, pursuant to an order shortening time of notice, for a hearing on September 24, 1965, was not heard until October 5, 1965 (*See* Appendix D to the Petitions for Writs of Certiorari in Nos. 990 and 991).

On the day prior to the hearing, October 4, 1965, the petitioner's counsel of record at that time, Phill Silver, Esq., filed a declaration which is set forth beginning at p. 761 of the Clerk's Transcript in 2nd Civ. No. 31472. An examination of the declaration will show that while various procedural arguments were advanced concerning whether or not the various discovery orders were effective, at no time did the petitioner's counsel assert that he had (1) no notice or opportunity to prepare to meet the motion to dismiss or (2) that the questions raised in this Court presented a constitutional or federal impediment to the trial court granting the relief requested by the estate representatives, namely, that the contest be stricken because of petitioner's refusal to give a deposition and to abide

by other orders directing the production of evidence pursuant to the California discovery statutes.[3]

The hearing on the motion to dismiss the will contest was held on October 5, 1965, before the Hon. Donald R. Wright, Judge Presiding in Department 4 of the Los Angeles Superior Court. Again, *no question was raised* concerning the constitutional right or power of the Los Angeles Superior Court to grant relief because of the petitioner's failure to abide by the discovery rules. The position as asserted by petitioner's counsel was to the effect that there were various reasons why the orders had not been honored and these reasons were found insufficient by the trial court upon substantial evidence. (*See* Transcript of the hearing on October 5, 1965, incorporated by the petitioner as Exhibit "Q" to his Petition in LA 29505).

The petitioner filed a motion for reconsideration (Clerk's Transcript, 2nd Civ. No. 31472, at 1026 *et seq.*). Again, the constitutionality of Code of Civil Procedure Section 2034 as written, or as applied to the petitioner, *was not placed at issue.*

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[3]The motion to dismiss the post-probate will contest was tried on the *facts* presented to the trial court by way of declaration and affidavit. Petitioner's then counsel filed a lengthy declaration of fact, referenced above. There was opportunity to file *other* declarations before the hearing. Moreover, the petitioner, *himself*, filed a twelve-page affidavit (containing factual assertions) in support of the motion to reconsider the order dismissing the post-probate will contest (Clerk's Transcript, 2nd Civ. No. 31472 at 804). Thus, the statement in the Petitions for Writ of Certiorari before this Court that "no testimony was taken by the trial court at the hearing on the motion to dismiss petitioner's will contest" must be considered intentionally misleading. Under California statutes, affidavits or declarations may be used in support of motions. *See* California Code of Civil Procedure §§ 2009; 2015.5.

C. Post-Probate Will Contest Proceedings in the Appellate Courts (2nd Civ. No. 31472).

Even if a proper federal constitutional question had been asserted before the trial court, the subsequent developments before the California Court of Appeal have provided an independent state ground barring the petitioner from relief.

During the period from October to December of 1965, the findings of fact and conclusions of law were being settled by the trial court and, on December 16, 1965, the order of dismissal was embodied in a written order signed by Judge Wright of the Los Angeles Superior Court (*See* Appendix 2 hereto). From December of 1965 until January of 1967, there was a period of delay while the record on appeal was being prepared. Because of the many changes of counsel by the petitioner and his alternate status *in propria persona,* there evidently was considerable confusion in the Superior Court Clerk's Office and this apparently caused a delay in the preparation of the record. In any event, the record on appeal was ready for filing before the Court of Appeal in January of 1967. Petitioner's counsel at that time, who was not officially of record before the Court of Appeal, was given an informal notice by counsel for the estate, while at the same time the Clerk's Office was sending official notices to the mailing address listed by the petitioner in representing himself (*See* Exhibit "A" to "Opposition to Application for Augmentation of Record, etc.").

Under the California Rules of Court (Rules 16 and 17 - Appendix 4 hereto), an appellant's opening brief is due within thirty days after the record has been filed. On or about April 24, 1967, a motion to

dismiss petitioner's appeal in 2nd Civ. No. 31472 was filed with the Court of Appeal, Second Appellate District, State of California. This motion, listing seven grounds, was based primarily on petitioner's failure to proceed diligently in prosecuting his appeal, including his failure to file an opening brief within the required time and his failure to indicate that he had made any effort to prepare such a brief in the period of over a year since the notice of appeal was filed. Other grounds for this motion included failure to properly pay the filing fee or seek appropriate relief therefrom and the lack of substantial evidence of any cause of action as evidenced by petitioner's admissions and his conduct in the trial court. (*See* Motion to Dismiss Appeals in 2nd Civ. No. 31472).

Petitioner was, at this time, *in propria persona,* with regard to this appeal, but was represented by counsel in other matters. Respondents, consequently, served the motion to dismiss with related papers on both the petitioner and his then counsel. Petitioner was thus aware of the pendency of this proceeding because service was made on him at both his Texas and California addresses (*See* Appendix 3 hereto).

At the hearing of the motion to dismiss before the Court of Appeal on May 11, 1967, Ronald H. Bonaparte, Esq. appeared and upon presenting a substitution of attorney with an application to be recognized was granted status as petitioner's counsel of record. After argument, the motion to dismiss was granted by an order of the court made on May 11, 1967 (*See* Exhibit C to the Petitions for Writs of Certiorari in Nos. 990 and 991).

Under Rule 24 of California Rules of Court, a decision of the Court of Appeal becomes final as to that

court thirty days after filing. Within this thirty-day period, a rehearing may be granted on petition (Rule 27, California Rules of Court, set forth in Appendix 4 hereto).

The petitioner failed to file a request for a rehearing by the Court of Appeal and therefore the decision of that court became final on or about June 10, 1967.

California appellate procedure allows a petition to be filed in the Supreme Court of the State of California within thirty days after a decision of a Court of Appeal becomes final as to that court (*See* Rule 28, California Rules of Court, set forth in Appendix 4 hereto). Within this thirty-day period the petitioner, by Gilbert F. Nelson, Esq., filed a petition for hearing with the California Supreme Court. The constitutionality of the dismissal by the Court of Appeal of the petitioner's appeal was not questioned, nor was any issue asserted concerning the constitutionality of any conduct on the part of the Superior Court with respect to the dismissal of the post-probate will contest. This can easily be seen from an examination of that petition which is part of the record before this Court. On July 5, 1967, the Supreme Court of the State of California denied the petition for a hearing.

On or about July 10, 1967, the thirty-day period within which the Supreme Court could have granted a hearing expired and the remittitur was issued in due course from the Court of Appeal. No appeal or petition to the United States Supreme Court was filed until more than five months from that date.[4]

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[4]The last day review could be sought in *this* Court from the dismissal of the will contest and the dismissal of the appeal

(This footnote is continued on the next page)

After the decision of the Court of Appeal had become final and the Supreme Court of the State of California had refused to review the Court of Appeal's decision, petitioner filed a petition to recall the remittitur addressed to the Court of Appeal, Second Appellate District, State of California.

In this petition *for the first time* the petition was asserted that California Code of Civil Procedure Section 2034 as applied to the petitioner was unconstitutional, constituting a penalty and forfeiture in violation of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States that would constitute the taking of property in violation of constitutional guaranties of the Fourteenth Amendment to the Constitution of the United States (*See* p. 21 of Petition to Recall the Remittitur).

California appellate procedure allows an appellant to request an appellate tribunal to reassert jurisdiction through recalling its remittitur in cases involving fraud or imposition practiced upon the appellate court, or if the judgment was rendered because of the appellate court's mistake of fact or lack of knowledge of the circumstances (*See* 3 Witkin, *California Procedure,* at 2370-73 (1954)). Petitioner failed to establish any such grounds for recall of the remittitur and his pe-

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therefrom was October 3, 1967, which was 90 days from the date the California Supreme Court denied the petition for hearing. *See Market St. Ry. Co. v. Railroad Comm'n.*, 324 U.S. 548 (1945) (dealing with the California Rules on Appeal). The petition for a writ of certiorari was thus first presented to this Court more than two months after the day that jurisdiction to entertain the petition expired. 28 U.S.C. § 2101(c). The order extending petitioner's time for filing his petitions was also made more than two months after this Court's jurisdiction expired.

tition was denied on July 27, 1967. Thereafter, a petition for a hearing by the Supreme Court of the State of California was requested and this also was denied on September 7, 1967.

D. Petitioner's Original Appellate Proceedings in Case Designated LA 29505.

Having failed in his direct effort to re-open his status as an appellant, the petitioner on September 5, 1967, filed a petition in the Supreme Court of the State of California which was entitled "Petition for Writ of Prohibition, Writ of Mandate and Any Other Appropriate Writ". By this petition, an effort was made to attack collaterally the validity of the final judgment of July 5, 1967, in 2nd Civ. No. 31472. The petitioner there made various allegations designed to raise questions under the Fifth and Fourteenth Amendments to the Constitution of the United States. Essentially, the position was asserted that the order striking the will contest for refusal to allow discovery was an unconstitutional deprivation of the party's right to a hearing.

The respondents filed opposition to that petition, pointing out serious factual discrepancies in the statement of the case, urging the proposition that the petition was a sham and frivolous effort to delay administration of the estate and pointing out the lack of substance in the constitutional question asserted. (*See* Opposition of Certain Real Parties in Interest to "Petition for Writ of Prohibition, Writ of Mandate and any other Appropriate Writ").

On October 11, 1967, the Supreme Court of the State of California, *en banc,* denied the petition without opinion.

III.

REASONS FOR DENYING THE WRIT.

A. No Substantial Federal Question Was Raised in the State Courts in Time to Be Properly Considered and Decided.

It is well settled that this Court will not pass on federal constitutional issues which were not timely raised in the state courts. *See, e.g., Beck v. Washington,* 369 U.S. 541, 553 (1962); *Hanson v. Denckla,* 357 U.S. 235, 244 (1958); *Godchaux v. Estopinal,* 251 U.S. 179, 181 (1919).

The record before this Court shows that the first time petitioner asserted that the dismissal of the will contest (on the grounds of his refusal to give discovery) constituted a violation of the Constitution of the United States was in a petition to recall the remittitur. This petition was filed long after the dismissal of the will contest had become final and the time for rehearing had expired.

It would not be unfair to conclude that this contention of petitioner comes as an afterthought. It was not raised in the trial court where the entire matter of the dismissal of the will contest was extensively briefed. It was not raised in the Court of Appeal although petitioner had ample opportunity to do so, by brief, before the motion to dismiss the appeal was made. Even after being served with a notice of the motion to dismiss the appeal, petitioner had the opportunity to raise the federal question. Again he did not do so and in fact made no personal or written appearance before the Court of Appeal on the hearing of the motion, a circumstance which provided one basis for the dismissal

of the appeal. *See* California Rules of Court, Rule 41, set forth in Appendix 4 hereto.

Petitioner could have availed himself of another chance in the Court of Appeal to raise the federal question by filing a petition for rehearing but again he elected not to do so. The federal question was not raised in the Supreme Court of the State of California when the petitioner, this time through counsel, filed a petition for hearing.

State procedural rules govern the timeliness with which a federal question must be raised. As this Court stated in *Edelman v. California,* 344 U.S. 357 at 358 (1953):

> It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with requirements of state law (citing cases).

Accord, Barbour v. Georgia, 249 U.S. 454, 460 (1919); *Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291 (1903).

Under California law, the trial court is the place to raise constitutional issues if they are to be preserved and properly considered by the highest courts of the state. A recent California decision notes that:

> It is fundamental that issues or questions not raised or presented to the trial court will not be considered in the reviewing court.
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> *Estate of Cunningham,* 148 Cal. App. 2d 8 at 13 (1957).

In *Jenner v. City Council*, 164 Cal. App. 2d 490 at 498 (1958) the court states:

> 'The right to question the constitutionality of a statute may be waived. It is the general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived.' (Citation)' (*Hershey v. Reclamation Dist. No. 108*, 200 Cal. 550, 564.)

See also, Dimmick v. Dimmick, 58 Cal. 2d 417 (1962); *Apra v. Aureguy*, 55 Cal. 2d 827 (1961); *Everly Enterprises, Inc. v. Altman*, 54 Cal. 2d 761 (1960); *Damiani v. Albert*, 48 Cal. 2d 15 (1957).

Even assuming that petitioner had raised his constitutional objections in a petition for rehearing in the Supreme Court of California, which he did not, it is well settled that the jurisdiction of this Court cannot attach unless the court to whom the petition for rehearing is directed actually entertains the petition and expressly decides the federal question. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *McGarrity v. Delaware River Bridge Comm'n.*, 292 U.S. 19, 20 (1934); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932).

If a federal question comes too late for purposes of this Court's review when raised for the first time in a petition for a rehearing, *a fortiori* it comes too late when raised *later*, for the first time, in a petition for the recall of the remittitur which was denied both in the Court of Appeal and in the Supreme Court of California without opinion.

It should be observed that the relief available on a motion to recall the remittutur is much more restricted

in scope than the relief available on a petition for a rehearing. The motion to recall the remittitur, while used in the case at bar as an attempt to review directly the judgment of dismissal of the will contest, properly extends only to cases where the judgment on appeal has been obtained upon a false suggestion, by fraud or imposition on the appellate court, or under a mistake by that court as to the facts of the case. *Isenberg v. Sherman,* 214 Cal. 722 (1932); *Rowland v. Kreyenhagen,* 24 Cal. 52 (1864). Thus, the issue before the court on the petition to recall the remittitur was whether the dismissal of the appeal because of the failure of petitioner to abide by established procedural rules was proper. It was not the question of possible constitutional error in the trial court.

The petition for extraordinary writs to the Supreme Court of the State of California, in LA 29505, was only a method to attack collaterally the judgment of dismissal of the will contest by the trial court and once again seek review of this decision in the appellate courts.[5] The granting of such writs is within the dis-

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[5]Petitioner himself admits that his petition in the California Supreme Court in LA 29505 is merely a method to attack collaterally the judgment of dismissal of the will contest in the trial court. *See* Petition for Writ of Certiorari in No. 990, October Term 1967, at 28.

Certainly, the decision in *Lund v. Superior Court,* 61 Cal. 2d 698 (1964) does not provide authority for the repetition of procedure indulged in by petitioner. It merely indicates that a petition for an extraordinary writ may be proper even though an appealable order is placed in question. The question of appealability was not expressly decided there because the court found that "[r]egardless of the *ultimate ability* to appeal, prohibition is an appropriate remedy to circumvent the imposition of sanctions. . . ." (61 Cal. 2d at 709, Emphasis added.) The decision does not intimate that after a party has exhausted all of the ordinary ap-

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cretion of the court. A federal question is not timely when first raised in a petition asking a higher state court to exercise a *discretionary* power of review if such court declines to take jurisdiction. *El Paso & Southwestern R.R. Co. v. Eichel & Weikel,* 226 U.S. 590 (1913); Robertson & Kirkham, *Jurisdiction of the Supreme Court* 141 (Wolfson & Kurland ed. 1951).

Petitioner's belated attempt to raise the federal question in the matter at bar bears a marked similarity to the decision of this Court in *Loeber v. Schroeder,* 149 U.S. 580 (1893). In the *Loeber* case, the federal question was not raised until after a rehearing had been sought from the Court of Appeals of the State of Maryland. It was then raised in a motion to quash the *fieri facias* which issued after the judgment. This Court observed, at page 585 of 149 U.S.:

> The motion to quash the *fi. fa.* in this case on the grounds that the order of the court of appeals, which directed it to be issued, was void for the reasons assigned, stood upon no better footing than a petition for rehearing would have done, and suggested Federal questions for the first time, which, if they existed at all, should have been set up and interposed when the decree of the court of appeals was rendered on January 28, 1892.
>
> If any Federal question existed in the case the attempt to raise it came too late, . . .

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pellate proceedings, he may start anew by requesting review through a petition for an extraordinary writ.

Moreover, the case of *Crummer v. Beeler,* 185 Cal. App. 2d 851 (1960) demonstrates that an appeal is the proper, ordinary and adequate procedure for review where, as at bar, failure to make discovery results in a final judgment against the appealing party.

B. The Decisions of the State Courts on the Petition to Recall the Remittitur Were Based on Adequate Non-Federal Grounds.

The Court of Appeal and the Supreme Court of the State of California denied, without opinion, the petition to recall the remittitur. Even assuming that the federal question was properly raised in this post-judgment proceeding, where, as here, there is a denial without opinion, this Court should presume that the decisions of the California courts were based on non-federal grounds which, as seen below, were adequately raised in the record.

This Court has long held that there must be an affirmative showing on the record that a federal question was both presented to a state court *and* was necessarily decided by that court in dealing with the cause. Where this is not clearly indicated, especially because of the presence of an adequate non-federal ground, jurisdiction will be denied. *See, e.g., Lynch v. N. Y. ex rel. Pierson,* 293 U.S. 52, 54-5 (1934).

In his petition to recall the remittitur directed to the Court of Appeal, petitioner for the first time urged constitutional errors which allegedly occurred in the trial court. However, the relief available in such a proceeding goes only to the decision of the Court of Appeal. In the brief in opposition to the petition to recall the remittitur, respondents showed that there had been no fraud on the Court of Appeal, or mistake on that court's part, or any other error affecting the dis-

missal of the appeal. Respondents also objected to the petition to recall the remittitur because it failed to set forth *facts* justifying the relief it sought. Consequently, the decision to deny the petition to recall the remittitur can adequately be supported on these non-federal grounds.

Petitioner here has not met his burden to demonstrate why the non-federal grounds referred to above cannot account for the decision in the state courts. That burden is not met if it appears that the judgment of the state courts *might* have rested upon a non-federal ground. *Durley v. Mayo,* 351 U.S. 277, 281 (1956); *Stembridge v. Georgia,* 343 U.S. 541, 547 (1952); Rule 23(f), Rules of the Supreme Court of the United States.

There can be no doubt that the state grounds identified above are adequate to support the decisions of the Court of Appeal and the California Supreme Court. They are certainly broad enough, without reference to the alleged constitutional question, to sustain these decisions. They are also clearly independent of the alleged constitutional question and are certainly tenable, since these state grounds were not designed to prevent review of a federal question.

Since the purported federal question was not dealt with and was not necessary to support the decisions of the state appellate tribunals, the instant petition should be denied for this reason alone.

C. Petitioner Was in No Way Denied Due Process of Law by the Courts of the State of California.

(i) Section 2034 of the California Code of Civil Procedure, as Written, and as Applied to the Facts of the Case at Bar, Comports With Existing Constitutional Principles.

A review of the "Questions Presented" portion of the two petitions for writs of certiorari in Nos. 990 and 991 indicates that the gravamen of petitioner's alleged constitutional error is that the dismissal of his will contest by the trial court was improper.

However, the dismissal of the will contest was based on the findings of fact (Appendix 2 hereto) which clearly demonstrated petitioner's many flagrant violations of the discovery rules, including *direct interference with discovery sought from independent non-party witnesses.*[6] These violations betrayed a lack of merit in the will contest.

Petitioner himself dismissed the pre-probate will contest. It was with regard to this contest that he had admitted, in a deposition, that he had *no evidence* to support the allegations there made. *See* Appendix 2 hereto.

The post-probate will contest was virtually identical with petitioner's pre-probate contest. Petitioner's course of conduct after filing this post-probate contest confirmed, by implication, the express admissions he had previously made disclosing the absence of a meritorious position. Thus the trial court, acting on the authority of California's discovery statutes, reasonably concluded

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[6]Findings of fact by state courts are accepted, without question, by this Court. *Grayson v. Harris,* 267 U.S. 352, 358 (1925).

that petitioner had no basis for a will contest of any kind.

The constitutional question of a court's power to default a contumacious litigant, or to dismiss his suit, was settled by this Court in *Hammond Packing Co. v. Arkansas,* 212 U.S. 322 (1909). The *Hammond* case was a prosecution under state anti-trust laws in which the appellant was ordered to produce certain named employees for the taking of their depositions and to make available for inspection various books, records, and documents. The appellant refused to comply and subsequently his answer was stricken and judgment entered by default. On appeal the contention was made by appellant that striking his answer and entering a default judgment was a denial of due process of law. The court clearly disagreed by saying:

> This case presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in Hovey v. Elliott, and the power exerted in this,

> is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other.
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> . . . .
>
> As the power to strike an answer out and enter a default, conferred by § 9 of the act of 1905, which is before us, is clearly referable to the undoubted right of the lawmaking authority to create a presumption in respect to the want of foundation of an asserted defense against a defendant who suppresses or fails to produce evidence when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation. 212 U.S. at 350.

Recent federal cases applying the *Hammond Packing Co.* decision include *Peitzman v. Illmo,* 141 F. 2d 956 (8th Cir. 1944), which affirmed the default judgment holding the appellant liable for breach of contract upon his refusal to appear for the taking of his deposition. Another such case is *Fong v. United States,* 300 F. 2d 400 (9th Cir. 1962), *cert. denied,* 370 U.S. 938, which involved a refusal to respond to a notice to take appellant's deposition and a court order to appear. A motion to strike appellant's answer and order him in default for his failure to attend deposition examinations

was granted. This was upheld on appeal because the court found the appellant's failure to appear was willful.

In the leading California case, *Unger v. Los Angeles Transit Lines,* 180 Cal. App. 2d 172 (1960), the striking of an answer and entry of default pursuant to Code of Civil Procedure Section 2034 was upheld as constitutional. In explaining how Section 2034 of the California Code of Civil Procedure comports with the constitutional principles regarding due process of law, the court quoted, with approval, from Moore's *Federal Practice* as follows:

> 4 Moore's Federal Practice (2d Ed.) § 37.03, page 2805, speaking of the federal counterpart of our discovery statute, summarizes the effect of the authorities, saying: "In its Note to Rule 37 the Advisory Committee points out that a distinction must be made between the justifiable use of orders of this sort as a means of compelling the production of evidence, and their unjustifiable use for the mere purpose of punishing for contempt. The two landmark cases on this question are *Hammond Packing Co. v. Arkansas,* decided by the Supreme Court in 1909, and the Court's earlier decision in *Hovey v. Elliott.* The *Hovey* case establishes that it is a denial of due process of law to punish a party for contempt by striking his answer from the files and rendering a default judgment against him. The *Hammond* case, however, makes it clear that a defendant's answer may be stricken and default judgment entered for failure to secure attendance of witnesses and to produce documents; the Court's theory was that 'the

> preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.' In most cases there will be no difficulty in determining which of these two decisions is controlling." 180 Cal. App. 2d at 187,

Since petitioner's refusal to give discovery was held to be willful and since he was given every opportunity to give his deposition, produce documents and answer interrogatories, it can readily be seen that the order dismissing his amended will contest was not made to punish him but was rather made as a necessary means to compel discovery. It is therefore proper under the statutes of California and the constitutional tests set forth in the foregoing authorities.

In the petition before this Court, the cases of *Hovey v. Elliott,* 167 U.S. 490 (1897) and *Societe Internationale pour Participations Industrielles v. Rogers,* 357 U.S. 197 (1958) are cited evidently in support of the contention that the trial court denied petitioner due process of law in dismissing his will contest. The *Hammond* case is conspicuously absent from the petition, possibly because it provides the applicable rule for this case, to wit: that due process is preserved by presuming that the refusal to produce material evidence is an admission of lack of merit.

The *Hovey* case is clearly distinguishable since it involved solely punishment for contempt. Similarly, the *Societe Internationale* case is distinguishable as involving an order of dismissal despite a finding of a good faith inability to comply on the part of the party failing to produce certain records. In contrast, there is

no indication in the case at bar of an attempt to punish for contempt or that petitioner acted in any way other than in a willful, contumacious manner and with a complete lack of good faith in ignoring the several discovery orders made by the trial court.

In circumstances where a party willfully and persistently refuses to participate in the discovery process, due process of law to his opponent can be served only by dismissing the recalcitrant party's suit. No party to a lawsuit can realize due process where one party denies the flow of information necessary to trial preparation and thereby a fair trial to the other. The legislature must be free to empower courts to maintain, effectively, the orderly administration of justice. As applied in the case at bar, the dismissal was the only fitting, practical and proper solution to a situation where petitioner refused to abide by established procedural rules after having expressly and by his actions admitted his cause had no foundation in evidentiary fact.

(ii) No Fraud, Extrinsic or Otherwise, Was Practiced on the Trial Court, on the Appellate Courts or on Petitioner.

The alleged extrinsic fraud concerning the "Certificate of Readiness", which apparently is the basis of the petitioner's seventh "Question Presented", is a shopworn contention thoroughly argued and considered by the California courts in the matter at bar.

There is no merit in the allegation or insinuation that the trial court, the appellate courts or the petitioner were misled by the "Memorandum for Setting Contested Action and Certificate of Readiness" which

has been included as "Appendix D" of the Petition to Recall the Remittitur. Petitioner has contended that on July 22, 1965, in this document (Appendix D), the respondents "set forth that all discovery has been made. . . ." (*See* Petition for Writ of Prohibition, etc. at 8).

This Court should notice the following:

(a) The form ("Appendix D") was marked to indicate that it concerned a type of case for which pretrial was not required;.

(b) The stamped date of filing of the form was July 22, 1965; and

(c) The printed representations concerning readiness for pretrial and also as to whether discovery had been completed were clearly deleted by "X-ing" out this language.

The circumstances concerning the preparation and presentation of this form by Ernest J. Zack, Esq., on behalf of respondents, was explained in the statement made on October 5, 1964, reported in the transcript attached to the Petition for Writ of Prohibition, etc. as "Exhibit Q". *See* pages 22-3 and page 71, lines 9-18 of said "Exhibit Q".

In brief, because the action involved a will contest, no pretrial was required and therefore representations concerning completion of discovery were not required and the form constituted nothing more than a memorandum requesting a trial setting.

That petitioner was not misled is seen from a stipulation (*See* Clerk's Transcript at 219 in 2nd Civ. No. 31472), signed by Phill Silver, Esq., who was then attorney of record for the petitioner, which was filed

on August 23, 1965. It demonstrates that nearly a month after the filing of the so-called "Certificate of Readiness", the petitioner unqualifiedly acknowledged a Notice of Deposition and stipulated to its continuance until September 1, 1965.

Thus from the foregoing record, it clearly appears that the "Certificate of Readiness" did not contain any representations that discovery had been completed and therefore there was no fraud, extrinsic or otherwise. Moreover, it can be seen that Judge Wright, with regard to the Motion to Dismiss, directly considered the nature and effect of the "Certificate of Readiness" and ruled adversely to the petitioner.

This same explanation, the stipulation and the trial court's direct consideration of the "Certificate of Readiness" was in the record before the California appellate courts. Their actions were thus based on a full consideration of all aspects of this matter.

(iii) Petitioner Was Given Every Reasonable Opportunity to Be Heard on the Merits of His Claims.

Petitioner, by dismissing the pre-probate will contest, prevented his claims from being heard on their merits.

This dismissal came at the last minute, just prior to the hearing on the admission of the will to probate. Petitioner clearly had notice of this hearing and had an opportunity to contest, which he chose not to take.[7]

---

[7]Petitioner was present himself during the hearing on the admission of the will to probate. Although given numerous opportunities to cross-examine the witnesses called in support of the will, he declined to so do. More significantly, petitioner, although an attorney at law admitted to the California bar, made no objection concerning foundations for the testimony of witnesses, nor did he there contend that there was something wrong wth the date of subscription of the will, or that the will was allegedly a product of undue influence.

Petitioner's post-probate will contest was virtually an exact copy of his prior contest. As outlined herein, petitioner, both directly and through counsel, thwarted all attempts by respondents to secure some inkling of the factual basis for his post-probate contest. Since his pre-probate contest was *admittedly* without foundation, such efforts were entirely reasonable.

Some indication of the efforts of petitioner to evade having to admit under oath that his post-probate contest also was without merit can be gained from the remarks of Judge Wright, made after an afternoon of argument by counsel for both petitioner and respondents on the motion to dismiss the post-probate will contest. Judge Wright observed:

> As I mentioned at the opening of this hearing, I spent a considerable amount of time going over all of the recent proceedings and pleadings that have been filed in this matter. I also reviewed in their entirety, although most assuredly not minutely, the entire files. We are now on Volume 4, I believe.
>
> I want it clearly understood, first of all, that any order I make is not based upon a perusal of the file but is based simply upon the legal issue which is before this court as to whether or not the relief should be granted because of conduct persisted in by counsel for contestant, and in some respects the contestant himself.
>
> . . . .
>
> I do feel that in my some thirty-three years as a lawyer and a judge that I have never seen a more blatant case where counsel prohibited and prevented discovery from taking place. In my own

humble opinion, it is simply an example of how you can make a mockery out of the law if you are tenatious enough, and tenacity is just what it is.

I feel that there is no other appropriate remedy than to order the contest to be dismissed, and I so rule, because of the willful disobedience to orders and the refusal to comply with orders of this court in connection with discovery proceedings.

Worthy of note, although in no way affecting my decision, is that I read the original will contest before probate and I noted that it came clear up to trial when the contestant dismissed the same on his own motion; I noted that he waited almost until the expiration of the statutory time and then he filed another contest after probate, and I could see little or no difference whatsoever from the one that he had voluntarily dismissed. He turned right around and filed the same document again, or essentially the same document. It was, of course, cured later by demurrers. But I never have seen a case where an estate has been so fraught with litigation. Just look at the size of those files.

I do note that Mr. Joslyn has had eight attorneys now in this matter. He not only does that but he writes to me personally and is condemning his counsel because they don't get an accounting by a certified public accountant.

The dismissal is the only way that the matter can properly be handled and so, as I have indicated, based only upon the legal grounds which are set forth, on the contestant's willfulness the willful disobedience, which is nothing short of bla-

tant, the will contest is hereby dismissed. (Petition for Writ of Prohibition, Exhibit Q at 74-6).[8]

Petitioner's contentions that he lacked notice of the various proceedings, that he wasn't heard, that the amended will contest as opposed to the "will contest" was dismissed without hearing, and that there was no testimony to support the dismissal of the will contest are without factual foundation.

Petitioner's sixth "Question Presented" suggests that he had no notice or opportunity to be present when the *amended* will contest was dismissed. The foregoing excerpt from the record shows the extensive consideration given by the trial judge to the motion seeking a dismissal of the will contest. The record also clearly shows that neither the court nor petitioner's counsel were confused concerning the fact that the post-probate will contest was amended after having been filed. It further shows that petitioner was represented by a lawyer at the hearing, who had received sufficient notice to prepare and file an extensive declaration in opposition to the motion to dismiss.[9] Thus it appears that the allegations concerning lack of notice and an opportunity to be heard find no support in the record.

---

[8]The suggestions, in the Petitions for Writs of Certiorari in Nos. 990 and 991, especially at 27, to the effect that improper influence was exerted on the California courts by counsel for respondents, is a slur both on these courts and upon counsel for respondents. *The record does not in any way, even remotely, support these statements by petitioner.* They should be stricken pursuant to Rule 40 of this Court.

[9]Petitioner's suggestion that California Probate Code § 1200 was violated in some manner is likewise without foundation. That section, by its terms, is limited to certain listed probate petitions and reports, *not* including will contests or any proceedings in connection therewith. These matters are governed, in California, by the Code of Civil Procedure. In any event, the trial court found expressly and by implication, that all notices had been properly given or waived by petitioner. *See* Appendix 2 hereto.

Petitioner, himself, supplemented his attorney's declaration of fact with a lengthy affidavit of fact in support of his motion to reconsider the dismissal of his will contest. Accordingly, his suggestion that the trial court's dismissal of the will contest was "not based on any testimony" also finds no support in the record.

The record also indicates that petitioner was personally served with notice of the motion seeking a dismissal of his appeal from the trial court's action.

The record, then, does not support an inference that petitioner was denied a hearing on the merits of his will contest, at any stage, in the courts of California. The record does compel the conclusion that there was a full opportunity afforded petitioner to present any case he might have. He chose, however, to dismiss one contest and then to impliedly admit, by his actions, that his second contest was similarly devoid of merit.

IV.

CONCLUSION.

The petition for a writ of certiorari should be denied because the record shows that no federal or constitutional question was raised until *after* orders dismissing the will contest by the Superior Court, Court of Appeal and Supreme Court of the State of California had become final. Further, the decisions in the appellate court were based on adequate non-federal grounds.

The record also shows that the petitioner, in effect, confessed the lack of merit in his will contest by refusing to allow discovery and by interfering with the efforts by the estate representatives to secure discovery from witnesses. By reason of the petitioner's will-

ful refusal to obey discovery orders, the Superior Court of Los Angeles County eventually directed that his will contest be dismissed. This order was made pursuant to the provisions of Section 2034 of the Code of Civil Procedure of the State of California. The validity of statutes such as this, as written and applied, have been upheld by the Supreme Court of the United States. As applied in the case at bar, no constitutional rights of petitioner were infringed.

For the foregoing reasons, this petition for a writ of certiorari should be denied.

February 1, 1968.

Respectfully submitted,

JAMES H. KINDEL, JR.,
JOHN W. ARMAGOST,
By JOHN W. ARMAGOST,

Counsel for Respondents and Real Parties in Interest, Merritt L. Joslyn, Mary C. Parker Currivan, Roland Merritt Joslyn, Joy Louise MacNulty, Joylon David Joslyn, Theodore Newell Joslyn, Celia Alice Parker, M. Wesley Parker, III, Marcellus Joslyn Parker, Alice Joslyn, William Dwight Joslyn, Penny Irene Joslyn, Marcellus LeFevre Joslyn, Marina Elaine Joslyn, Lois E. Mendenhall, Mrs. Mary R. Shoff Carey, Marcia Harriet Joslyn Sill, Robert F. Dolan, and Robert D. MacDonald, Individually and as Executor of the Last Will of Marcellus L. Joslyn, Deceased.

Of Counsel:
KINDEL & ANDERSON

APPENDIX 1.

Exhibit "G".

Superior Court of the State of California, for the County of Los Angeles.

In the Matter of the Estate of Marcellus L. Joslyn, aka M. L. Joslyn and Marcellus Lindsey Joslyn, Deceased.

Marcellus N. Joslyn, Contestant, v. Robert D. MacDonald, et al., Defendants. No. P-471,032.

EXHIBIT "A"

TO DECLARATION OF ERNEST J. ZACK IN SUPPORT OF MOTION FOR ORDER DISMISSING WILL CONTEST AND/OR FOR OTHER RELIEF PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 2034.

Specimen areas of contest as to which Contestant had no information at the time of taking deposition of December 12, 1963, and which would have been further explored in his deposition stipulated to be taken September 1, 1965.

1. The first ground of contest (on information and belief) is that the will was not executed in the form and manner prescribed by law.

However, in his prior deposition, Contestant testified on this point as follows:
(page 422, lines 19 to 24)

> "Q. Now, I have asked you a different question and I am sorry I let you go, but my question was completely different. It was: What do you point to, either on or off the face of the will,

which indicates that the two witnesses were not present at the same time?

"A. I can't say at this time."

(page 422, line 25 to page 23, line 2)

"Q. Now, what do you point to that shows that the testator did not acknowledge it to be his will in their presence when they were here?

"A. I can't say at this time."

(page 423, lines 6 to 12)

"Q. Let's take item (2):

" 'The testator at the time of subscribing or acknowledging the said instrument did not declare to the attesting witnesses that it was his will . . .'

"Now, what information do you have on that subject that you allege at that point?

"A. I can't say at this time."

(page 423, lines 13 to 26)

"Q. No. (3):

" 'The witnesses to such purported instrument did not sign the same as such witnesses at the end thereof at the testator's request or in his presence.'

"What do you have to support that allegation at this time?

"A. Only what the will itself shows right now.

"Q. What does the will show which, in your opinion, supports that allegation?

"A. Well, the will itself, isn't it?

"Q. Well, I am not here—whatever anyone else may think—to argue.

"A. I can't say at this time, to save you time, Counsel."

2. The second ground of contest (on information and belief) is that the decedent was of unsound mind, and incompetent to make the will.

However, in his prior deposition, Contestant testified on this point as follows:

(page 426, lines 23 to 25)

"Q. Do you have any evidence that he would not in fact have known that this was a will on that day?

"A. I can't give you specific evidence at this time."

(page 427, lines 11 to 17)

"I am talking about the substantial bulk of his property; would he have known on that day what it was?

"A. Well, I can't say for sure at this time.

"Q. You have no evidence that he would not have been able to do that on that day?

"A. Well, I just can't say for sure."

3. The third, fourth and fifth grounds of contest (on information and belief) are that the will was procured under undue influence of defendants Robert D. MacDonald, Lois E. Mendenhall and Mary R. Shoff Carey.

However, in his prior deposition, Contestant testified on this point as follows:

(page 433, lines 2 to 7)

"Q. Would you be able to give me any kind of a picture, any facts of any kind bearing on the proof that Mrs. Carey was a confidant of your father as to matters other than the specific matters in which they had mutual business interests?

"A. I couldn't give you any information of that,"

(page 434, lines 21 to 24)

"Can you name any business activity in which Mrs. Mendenhall had any influence over your father?

"A. I couldn't at this time give you a—pinpoint a specific instance. I would have to go to the record on that."

(page 438, line 22 to page 439, line 3)

"Q. So in substance you don't know of any activity of Mrs. Carey with reference to the will except that she is named as an alternative executrix?

"A. At this time that is all.

"Q. And that she was a witness to the will?

"A. That is right.

"Q. That is all you know that she had to do with it?

"A. That is right."

(page 439, lines 4 to 7)

"Q. What activity did Lois Mendenhall engage in with reference to the preparation of the will?

"A. I would say I don't know at this time of anything except what the will itself reveals."

(page 439, lines 17 to 22)

"Q. And you don't know whether she had any part at all in the chain of events which led to the execution of this specific document, I mean, as far as—

"A. Immediate—

"Q. —immediately prior thereto?

"A. I don't know of any at this time."

(page 440, lines 7 to 11)

"Can you tell me on what you base your allegation that Mrs. Carey dominated your father in the preparation and/or execution of the will?

"A. Well, at this time I can't give you specific instances."

(page 443, lines 11 to 16)

"Q. So that when you allege as you do, commencing on Line 17, Page 6, that your father's will was dominated by the defendants at the time he executed it, you don't have any information that would support any specific domination at that time?

"A. At this time I couldn't say."

(page 444, line 23, to page 445, line 9)

"Q. One other question. You say you don't know that they acted in consort with reference to this will. Do you know, as to the matter of preparing this will, and its execution, whether or not they all knew substantially all of the facts the others knew as to the will and what was going to be done in the will? Is that a clear question to you?

"A. I think I know what you want.

"Mr. Dolle: It is not clear to me.

"Mr. Zack: Not to you?

"The Witness: I think I know what you want.

"Mr. Zack: Read it back, please.

(The pending question was read by the reporter.)

"The Witness: The answer is I can't say at this time."

(page 446, lines 8 to 13)

"You have said above that you have no knowledge of money, of threats, or inducements, or anything having to do with the procurement of this specific will by Mrs. Mendenhall, Mr. MacDonald and Mrs. Carey; is that correct?

"A. At this time I suppose it is right."

(page 446, lines 19 to 22)

"Will you tell me what support you have for the allegation that Mrs. Carey would unduly profit from the estate if the will is admitted to probate?

"A. Well, I can't say right now."

(page 459, lines 9 to 16)

"Q. And, therefore, you have no information on the allegation, on Line 25:

"'. . . that in pursuance of said conspiracy said conspirators obtained from decedent the aforesaid purported Will'?

"You don't have any information on that subject?

"A. Only by implication of various things, various things."

(page 460, lines 8 to 23)

"Q. And you say:

"'That said defendants'—commencing on Line 4, Page 9—'Robert D. MacDonald, Lois E. Mendenhall, and Mary R. Shoff Carey, and each of them, have been and are guilty of oppression, fraud and malice, express and implied . . .'

"Now, will you tell me what facts or statements of Mrs. Carey indicate that she was guilty of oppression, fraud or malice?

"A. I don't know of any at this time.

"Q. You don't know of any express oppression, fraud or malice on her part, do you?

"A. No, not at this time.

"Q. You don't know of any implied oppression or malice on her part?

"A. Not at this time."

(page 462, lines 20 to 26)

"Q. You have not answered the question, though. The question is: You have alleged here that these parties are guilty of oppression, fraud and malice, and efforts to cheat and defraud you and your brothers and sister, with reference to this estate. I am asking you, is that allegation true that you make there at the top of Page 9.

"A. I can't say at this time."

(page 465, lines 16 to 19)

"Q. Do you know anything specific which would tend to indicate that Mrs. Mendenhall got her bequest as a result of this conspiracy?

"A. I don't know of anything specific at this time."

4. The sixth ground of contest (on information and belief) is that the will was obtained by fraudulent representations of Robert D. MacDonald, Lois E. Mendenhall and Mary R. Shoff Carey made to the decedent.

However, in his prior deposition, Contestant testified on this point as follows:

(page 471, lines 2 to 9)

"Q. All right. Now, as to Mr. MacDonald, what false representations, false and fraudulent

representations, did he make to your father for the purpose of poisoning his mind?

"A. I don't know of any at this time.

"Q. You don't know of any?

"A. At this time.

"Q. Don't you think that is a rather serious allegation to make without any evidence, Mr. Joslyn?"

(page 474, lines 2 to 8)

"Q. Now getting back to this contest, can you tell me any false or fraudulent representations made to the decedent by Lois Mendenhall?

"A. I don't know of any at this time.

"Q. Do you know of any false or fraudulent representations made to the decedent by Mary R. Shoff Carey?

"A. I don't know of any at this time."

(page 474, lines 9 to 17)

"Q. Do you know from any source that one, or all, or any combination of these same individuals on Line 24 of Page 9 had stated to the decedent that they alone were interested in his welfare?

"A. I can't say that I do at this time.

"Q. Do you know anything said by Mr. MacDonald, Mrs. Mendenhall, or Mrs. Carey, or any combination of them, to the effect that the decedent's children bore no love for him?

"A. I don't know of any at this time."

(page 474, line 25 to page 475, line 3)

"Q. Well, you alleged on information and belief, as is indicated on Line 22, that this was true. On what did you base these allegations?

"A. I followed the advice of my counsel and his pleading, and that is all I know about it."

(page 476, lines 4 to 8)

"Q. Then, as a whole this Sixth Cause of Action, fraudulent representations, there is really nothing that you know of to support that ground of contest, is there?

"A. At this time I don't know of any support for it."

(page 476, line 21 to page 477, line 6)

"Do you have any information as to their being any reliance on any such representations by Mr. MacDonald, Mrs. Mendenhall, or Mrs. Carey?

"A. I don't recall any specific things about it, but naturally they were in a position of confidential relationship to the decedent, and he had in the past, and I believe did then, relied considerably on their direction and advice.

"Q. But as far as getting down to any specific allegation of any specific statement by these people to the effect set forth in this Sixth Ground of Contest, you don't know anything about that?

"A. At this time I can't say I do."

(page 477, lines 9 to 17)

"Q. And you allege in Line 12 of Page 10 that these allegations were relied on by the decedent and that they controlled the mind of decedent. Do you have any evidence to show that such allegations controlled the mind of the decedent in making this will?

"A. Not except the general trend of my evidence.

"Q. Just the general trend, but nothing specific, is that right?

"A. Nothing specific as yet, that I can recall now."

I certify (or declare), under penalty of perjury, that the foregoing are true and correct copies of the questions and answers, and proceedings, in the deposition of Contestant, Marcellus N. Joslyn, taken September 12th to 18th, 1963.

Executed on September 3, 1965.

Kindel & Anderson
By Ernest J. Zack
Attorneys for Defendants

APPENDIX 2.

Findings of Fact, Conclusions of Law and Order Dismissing Amended Will Contest After Probate.

ENTERED
DEC 21 1965
WILLIAM G. SHARP, COUNTY CLERK
By ... DEPUTY

KINDEL & ANDERSON
ATTORNEYS AT LAW
SUITE 1020 SECURITY BUILDING
810 SOUTH SPRING STREET
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MADISON 6-8551

Attorneys for Certain Defendants

(SPACE BELOW FOR FILING STAMP) 1155

FILED
DEC ... 1965
WILLIAM G. SHARP, County Clerk
... DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In the Matter of the Estate of

MARCELLUS L. JOSLYN,
aka M. L. JOSLYN and
MARCELLUS LINDSEY JOSLYN,

Deceased.

No. P-471,032

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING AMENDED WILL CONTEST AFTER PROBATE

MARCELLUS N. JOSLYN,

Contestant,

vs.

ROBERT D. MacDONALD, et al.,

Defendants.

The Motion for Order Dismissing Will Contest and for Other Appropriate Relief made by certain Defendants pursuant to Code of Civil Procedure Section 2034 came on regularly for hearing at 1:30 p.m., on the 5th day of October, 1965, in Department 4 of the above-entitled Court, before the Honorable Donald R. Wright, Judge Presiding. Contestant, Marcellus N. Joslyn, appeared by his attorney, Phill Silver, and certain Defendants appeared by Kindel & Anderson and Ernest J. Zack, Malcolm George Smith and Russell W. Bogda, their attorneys.

The Court, after considering such Motion, the supporting declarations and points and authorities filed by the moving

Defendants, the declaration and points and authorities filed by Contestant, and the other pleadings and papers in the file, and the cause having been fully argued and submitted to the Court for decision;

NOW, THEREFORE, the Court being duly advised on the premises, does hereby find that proper notice of the hearing on the Motion to dismiss was duly given, and does hereby make its findings of fact, conclusions of law, and order herein as follows:

FINDINGS OF FACT

Nature and Status of Amended Will Contest After Probate at Time of Hearing of Motion to Dismiss

1. A document dated June 29, 1962, entitled Last Will and Testament of Marcellus L. Joslyn (hereafter referred to as Decedent), was filed with the Los Angeles County Superior Court for admission to probate on July 10, 1963.

2. Prior to the admission to probate of such document, Marcellus N. Joslyn, son of Decedent, and his then attorney, Harry Mabry, filed a Contest before Probate, the grounds of which were based solely on allegations made upon information and belief.

Named as Defendants in such Contest were the following: Decedent's other three children, namely George R. Joslyn, Merritt L. Joslyn and Mary C. Parker; Decedent's fifteen grandchildren, namely Marcellus LeFevre Joslyn, Roland Merritt Joslyn, Ilse Audrey Poleri, Marcia Harriet Joslyn, Marina Elaine Joslyn, Joy Louise MacNulty, Mary Alice Gurley, Jolyon David Joslyn, Theodore Newell Joslyn, Alice Joslyn, William Dwight Joslyn, Penny Irene Joslyn, Celia Alice Parker, M. Wesley Parker III, Marcellus Joslyn Parker; the named Executor, Robert D. MacDonald; and Mary R. Shoff Carey, Lois E. Mendenhall and Robert F. Dolan.

3. In connection with the defense of that Contest, the deposition of Marcellus N. Joslyn (hereafter referred to as Contestant) was taken commencing December 12, 1963, and adjourned

sine die on December 18, 1963.

At the time of the taking of that deposition it appeared that Contestant did not have substantial evidence to support most of the grounds of Contest.

Examples of such lack of evidence follow:

He alleged that Decedent at the time of subscribing or acknowledging the instrument did not declare to the attesting witnesses that it was his Will; when questioned concerning this allegation he said he had no evidence to support it. He alleged that Decedent had been the subject of undue influence by MacDonald, Mendenhall and Carey at the time he executed the document, but when questioned concerning this allegation he said he had no evidence to support it. Contestant further admitted he had no evidence of anything having to do with the procurement of the document by MacDonald, Mendenhall and Carey. He alleged that MacDonald, Mendenhall and Carey were guilty of oppression, fraud and malice in efforts to cheat him out of his inheritance; when questioned as to this allegation he admitted he had no evidence to support it. He alleged that the Will was obtained through fraudulent representations made by Defendants MacDonald, Mendenhall and Carey to the Decedent; when questioned as to this allegation he admitted he had no evidence to support it.

4. Such Contest was set for trial on March 31, 1964, but was voluntarily dismissed by Contestant on March 26, and the document was admitted to probate on April 29, 1964.

The above findings of fact are relevant in determining the extent of the Defendants' discovery during the Contest before Probate, and the propriety of further discovery by Defendants in defense of the Contest after Probate, as hereinafter found. The Order entered on the findings of fact and conclusions of law which follow is in no way based upon the facts that the grounds of Contest before Probate were alleged upon information and belief; that

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Contestant, at the time of the above deposition, appeared to have no support for some of such grounds; or that he voluntarily dismissed such Contest.

5. On October 27, 1964, Contestant, in pro per, filed a Contest after Probate, the grounds of which were virtually identical to those of his Contest before Probate, and the allegations of which were again made upon information and belief.

After demurrer sustained, Contestant and his then counsel, John S. Hunt, on January 4, 1965 (except as otherwise herein stated, all dates which follow are in 1965), filed an Amended Contest after Probate, the grounds of which were substantially the same as those of the preceding Contests and the allegations of which were again made upon information and belief.

6. On or about March 25, a Memorandum for Setting Contested Action was filed and served by Defendants. Hearing thereon was had on April 5, at which time this Court (Department One) reserved a trial date of October 6, such date to be set during July upon further application to the Court.

7. On July 22 this Court (Department One) set the Contest for trial on October 6. Notice of the July 22 hearing was mailed on July 16 to John S. Hunt, Contestant's attorney of record, and to Phill Silver. Notice of the October 6 trial date, as confirmed by such Court on July 22, was served by Defendants on both such attorneys and on Contestant on July 22.

8. A Motion by Contestant for continuance of that trial date was heard and (except for a continuance from October 6 to October 8) denied by this Court (Department One) on September 24. A further Motion by Contestant to vacate the trial date was heard and denied on October 1.

9. On September 20 Defendants filed and served the within Motion for an Order dismissing the Amended Contest after Probate pursuant to Code of Civil Procedure Section 2034.

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Events Relating to Obligation of Third-Party Witnesses to Submit to Discovery

10. Lillian Johnson, a nonparty witness, had executed two declarations concerning the testamentary capacity, undue influence, and health, mental and physical, of Decedent at times relevant to the execution of the Will which were filed on behalf of Contestant. On January 8 a notice for her deposition was served and filed and a Subpoena re Deposition was issued. Repeated attempts to serve Lillian Johnson with the Subpoena at the address she gave in her declarations and the attempts of a private investigator employed by Defendants to locate Lillian Johnson were unsuccessful. At the deposition of her son, John K. Johnson, on February 16, he refused, when asked, to give the whereabouts of his mother. Defendants have been unable, despite the exercise of due diligence, to make service of an Order of this Court made on April 5 requiring the son to furnish the address of Lillian Johnson and to give any other information that he might have concerning her whereabouts.

11. Rea Hildebrant and her husband, David Hildebrant, nonparty witnesses, executed a joint declaration concerning the testamentary capacity, undue influence, and the health, mental and physical, of the testator at times relevant to the Contest, which was filed on behalf of Contestant in this action. Rea Hildebrant also individually executed a declaration concerning the testamentary capacity, undue influence, and the health, mental and physical of the Decedent at times relevant to the Contest, which was filed on behalf of Contestant in this action.

On or about January 8 a notice for her deposition was served and filed, and a Subpoena re Deposition was issued. Defendants were unable to serve such Subpoena and the deposition was not taken. On or about April 22 a notice for her deposition was served and filed and Subpoena re Deposition was issued and served on her. On the date noticed for her deposition, May 15, she

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did not appear. Although an Order to Show Cause re Contempt was issued by this Court, Defendants have, despite the exercise of due diligence, been unsuccessful in serving it.

David Hildebrant also individually executed a declaration concerning the testamentary capacity, undue influence, and the health, mental and physical, of the Decedent at times relevant to the Contest, which was filed on behalf of Contestant in this action. Defendants, despite the exercise of due diligence, have never been able to serve him with a Subpoena re Deposition.

12. A notice was filed and served, and Subpoena issued, for the deposition of Florence McElwain, a nonparty witness mentioned by Contestant in his December, 1963, deposition as a witness having knowledge concerning the physical condition of the testator at times relevant to the Contest, which deposition was set for September 8. Although properly served, she did not appear on the date of her deposition. On such date Defendants received through the mail a letter from Florence McElwain stating that she would not appear for her deposition and that she had not been properly served. Although an Order to Show Cause in re Contempt was issued by this Court, Defendants were, despite the exercise of due diligence, unsuccessful in serving it prior to the filing of Defendants' Motion for dismissal.

13. Notices were filed and served, and Subpoenas issued and properly served for the depositions of Mr. and Mrs. Ed Wratten, nonparty witnesses mentioned by Contestant in his December, 1963, deposition as witnesses having knowledge of the testamentary capacity, undue influence, and the health, mental and physical, of the testator at times relevant to the Contest, which depositions were set for September 9. On September 8 Defendants received a letter from these witnesses stating that they would not appear for the depositions because they needed time to obtain counsel. Contestant's attorney, by letter dated September 8, advised the

Wrattens they were not required to attend the depositions on September 9 because they were set on a legal holiday. Such act of Contestant's counsel was an intentional attempt to, and did impede and prevent Defendants from obtaining the depositions of the Wrattens. They did not appear on the noticed date, and, despite the exercise of due diligence, Defendants have been unable to serve the Wrattens with an Order to Show Cause re Contempt issued by this Court.

14. Notices were filed and served and Subpoenas issued and properly served for the depositions of Mr. and Mrs. Leon Butterfield, nonparty witnesses mentioned by Contestant in his December, 1963, deposition as having knowledge of the mental and physical condition of the Decedent at times relevant to the Contest, which depositions were set for 10:00 a.m., Saturday, September 18, at Lakeport, California. Prior to such time Defendants received a written statement of a physician stating that the Butterfields were physically unable to appear in Court. On inquiry of the physician it was determined that they were able to appear for depositions, and the Butterfields were then notified by Defendants that the depositions would proceed as scheduled. At approximately 3:30 p.m. on September 17, Defendants received a letter dated September 16 from Contestant's attorney which advised the Butterfields that they were not required to attend the depositions because they were set for a Saturday, and that a notice setting a deposition on a Saturday was void. Although counsel for Defendants and a reporter appeared at the noticed time and place, the Butterfields did not appear. Counsel for Defendants thereupon proceeded to their home. Contestant and his wife were found there, and they refused to allow the depositions of the Butterfields to proceed. The presence of Contestant at the Butterfield's house and his refusal to allow their depositions to proceed and the act of Contestant's counsel in writing the letter of September 16 to the Butterfields were intentional attempts to, and did impede and

prevent Defendants from obtaining the depositions of the Butterfields.

15. The activities of Contestant and his counsel in connection with the Wrattens and Butterfields were a part of a scheme or plan which was preconceived by Contestant and actively pursued by him and his counsel with the intent of preventing Defendants from obtaining discovery from such witnesses prior to the October trial date and were a part of a scheme or plan which was also preconceived by Contestant and actively pursued by him and his counsel with the intent of preventing Defendants from obtaining any discovery prior to such trial date or forcing Defendants to go to trial without the discovery sought by them. The activities of Contestant and his counsel with the nonparty witnesses indicate willfulness on the part of Contestant in his personal refusal to submit to discovery, as hereinafter found.

Events Relating to the Obligation of Contestant to Submit to Discovery

16. Contestant has represented to the Court, and it is hereby found, that his address for purposes of service of notices and papers herein is General Delivery, Pasadena, California.

17. On August 10 notice of taking the deposition of Contestant on August 20 was filed and served by Defendants upon both Contestant and his attorney, Phill Silver. No other depositions of Contestant other than that of December, 1963, had been taken with reference to either his Contest before Probate or his Contest after Probate.

18. On August 12 interrogatories were served and filed on August 13 by Defendants as to Contestant's then knowledge of the whereabouts of Lillian Johnson and the Hildebrants.

19. On August 18 notice was filed and served of a hearing on August 23 of Defendants' Motion to compel Contestant to produce certain documents.

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20. On August 19 a Stipulation was signed and filed on August 23 at the request of Contestant's counsel, providing that Contestant's deposition be continued from August 20 to September 1 at 2:00 p.m. The Stipulation was made by Defendants' counsel on the representation of Contestant's counsel that the latter would be engaged in trial on August 20.

21. On August 19 notice of taking the deposition of Contestant on September 1 was again served on both Contestant and his attorney. Contestant was also served, prior to September 1, with a Subpoena to appear at the deposition on that date.

22. On August 23 Contestant appeared by counsel and requested that the hearing on Defendants' Motion to Produce Documents be continued to September 13. The declaration filed by Contestant's counsel on August 23 in opposition to the Defendants' Motion for Inspection of Documents did not raise the lack of sufficient notice of the Defendants' Motion. Even if it had been raised, lack of proper notice was waived by Contestant then requesting and obtaining a continuance of the hearing on the Motion to September 13. Such declaration of August 23 stated that Contestant's counsel had an oral argument before the Supreme Court of California on August 30, and that he would not be available until August 31 for proceedings in the Will Contest.

On August 26 Contestant's attorney filed a further declaration stating he would be available in the Will Contest on August 31.

23. On August 25 and 27 Motions were filed by Contestant for Protective Orders concerning Contestant's September 1 deposition and Defendants' interrogatories. Although he had previously stipulated to the taking of that deposition on September 1, and although the answers to the interrogatories were due not later than August 27, these Motions were set for hearing by Contestant on September 13. Despite setting such Motions for a date after

the deposition date and the due date of the answers to the interrogatories, Contestant did not ever file or obtain an order from this Court staying either the taking of the deposition or the filing and serving of answers to the interrogatories. Contestant did not serve or file a motion for a protective order against production of documents.

Contestant filed but one declaration in support of these motions for protective orders. The ground of both motions was that Defendants, in obtaining a trial setting on July 22, had filed a Certificate of Readiness, and, as a result, were barred from pursuing further discovery thereafter. The Certificate filed deleted the reference to pretrial and the statement that all deposition and discovery proceedings had been completed. Defendants have not and did not waive any discovery, nor represented to the Court at any time that no discovery would be pursued, nor was there any understanding or stipulation between Defendants and Contestant that Defendants would not seek discovery.

24. On August 25 Defendants filed and served Notice of Motion, set for hearing on August 27, for an Order resetting the hearing on Defendants' Motion to Produce Documents for September 3, for an Order confirming the September 1 deposition date and for an Order fixing August 31 as the last day upon which Contestant could file and have heard a Motion raising the issue of whether Defendants were entitled to discovery.

25. Not later than August 27 answers by Contestant to the previously submitted interrogatories were due. They were not filed or served on Defendants' counsel by such time. At no time on or prior to August 27 did Contestant request or receive, either from the Court or from Defendants' counsel, an extension of time within which to file and serve such answers. There was no stay or protective order of this Court instructing Contestant that he need not answer the interrogatories either prior to the date the answers

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were due, or at any other time. Contestant did serve and file answers to the interrogatories on September 24. They had, however, been executed by Contestant on August 24, and were not filed and served until after Defendants had filed the Motion to dismiss. Contestant intentionally withheld the answers to interrogatories until well after their due date in an attempt to impede Defendants' discovery and preparation for trial. Such answers did not respond to the interrogatories in that they did not give Contestant's knowledge as of the date submitted. Contestant intentionally avoided answering the interrogatories on the date filed and served in order to impede Defendants' discovery and preparation for trial. The failure timely to file responsive answers was willful and was a part of the scheme or plan which was preconceived by Contestant and actively pursued by him with the intent of preventing Defendants from obtaining any discovery prior to trial or forcing Defendants to go to trial without discovery.

26. On August 27, at a hearing at which Contestant's counsel was present and over his objection, this Court ruled that Defendants' Motion to Produce Documents be heard Friday, September 3, at 1:30 p.m., that the date for the taking of Contestant's deposition be confirmed for September 1 at 2:00 p.m., and that the hearing on Contestant's Motions for Protective Orders be advanced from September 13 to August 31 (i.e., prior to the noticed depositions of the Wrattens, McElwain and Contestant). On August 30 this ruling was incorporated in an Order signed, filed and served by messenger on Contestant's attorney's office.

27. On August 31 Defendants received Notice of Appeal by Contestant from the Order of August 30. Such Notice of Appeal was signed by Contestant's counsel under date of August 30, was filed on August 30, and was served by mail on August 30 from Hollywood, California, where Contestant's attorney has his office.

28. On August 31 at 2:00 p.m., pursuant to the Order of

August 30, the Court considered and denied Contestant's Motions for Protective Orders. Although neither Contestant nor his attorney appeared at the hearing, Contestant and his counsel had full and fair opportunity to be heard at such hearing. The date thereof was a subject of the Motion granted on August 27, at the hearing of which Contestant's counsel was present. The file of the action does not show that a request was made by either of such persons directly to the Court, or to Defendants' counsel, for a continuance of the hearing. Contestant's attorney had no conflicting Court appearances which would have prevented him from appearing at this hearing, and in view of the fact that there was good reason to have the matter decided before the depositions noticed by Defendants for September 1 and thereafter, no substantial excuse for Contestant's counsel's nonappearance has been made.

On September 1 this ruling on August 31 was incorporated in an Order signed, filed and served by messenger on Contestant's attorney's office.

29. On September 1 the deposition of Contestant was convened at 2:00 p.m. The file does not reflect that written objections by Contestant to any alleged errors or irregularities in the notices of depositions of August 10 and August 19 were ever served on Defendants. At no time prior to September 1 did Contestant or his counsel ask Defendants' counsel or the Court for relief from the Stipulation of August 19. On September 1 there was no Order of the Court, either staying the deposition, or granting a Protective Order, or in any other way preventing such deposition from proceeding as noticed, ordered and stipulated. Proper notice thereof had been duly given, and such deposition was also convened on that day pursuant to Subpoena timely served on Contestant and pursuant to the Order of September 1 of this Court which had been timely served. If there is any question whether Contestant had proper notice, or had not been the subject of an

Order under Code of Civil Procedure Section 2019(b)(2), such objections were waived by his Stipulation, by the physical presence of Contestant and his counsel at the proceeding without raising such objections, by his failure to serve written objections under Code of Civil Procedure Section 2021, and by his filing of a Motion for a Protective Order against the taking of the deposition on other grounds.

On September 1 Contestant and his counsel were present but Contestant refused to answer any questions as to the merits of the case at such time.

Contestant's counsel refused to permit the taking of the deposition on the following grounds: (1) that he was going to file a Petition for Writ of Mandate with the District Court of Appeal that afternoon, (2) that he had set for hearing on September 13 a Motion to Vacate the Order of August 30, and (3) that the taking of the deposition constituted harassment under Code of Civil Procedure Section 2019(d).

As to ground (1), such Petition for Writ was not filed until September 3. No stay order pending decision on the Petition for a Writ was issued by this Court or an appellate court prior to the deposition or at any time. Contestant and his counsel, in urging that the filing of a Petition for Extraordinary Writ (which was not on file at the time of the deposition) invalidated the deposition despite the fact a stay order pending decision thereon had not been obtained, had knowledge that such facts did not prevent the taking of the deposition. Contestant and his counsel intentionally adopted such ground in order to prevent the deposition from commencing and proceeding and filed such Petition in an effort to hinder and delay Defendants' efforts at discovery. Such Petition was denied by the District Court of Appeal on September 10.

As to ground (2), although the Motion to Vacate was filed September 1, no order staying the deposition pending the

decision on the Motion to Vacate was ever issued by this Court. Contestant and his counsel, in urging the pendency of a hearing on a Motion to Vacate invalidated the deposition despite the fact a stay order pending decision thereon had not been obtained, had knowledge that such facts did not prevent the taking of the deposition. Contestant and his counsel adopted such ground in order to prevent the deposition from commencing and proceeding and filed such Motion to Vacate in an effort to hinder and delay Defendants' efforts at discovery. When the Motion to Vacate was heard on September 13, neither Contestant nor his counsel appeared, and it was denied. The failure of Contestant and his counsel to appear at such time shows that in adopting the hearing of such Motion as a ground of invalidating the deposition, Contestant and his counsel had knowledge that it was an invalid ground therefor and that it was filed solely to prevent the deposition from commencing.

As to ground (3), the deposition had been expressly restricted to facts obtained by Contestant since his December, 1963, deposition. The asked questions directed to such facts were not repetitious, harassing, annoying or oppressive. In refusing to answer such questions on such grounds, Contestant did not specify wherein any of such grounds occurred as to such questions. In instructing Contestant not to answer such questions because of such grounds, Contestant's counsel did not specify wherein any of the grounds occurred as to such questions and admitted that he had not read the December, 1963, deposition to determine whether such questions would result in repetition, harassment, annoyance or oppression. In urging such grounds, demanding that the deposition be suspended, and suspending it pursuant to Code of Civil Procedure Section 2019(d), Contestant and his counsel prevented the deposition from proceeding. Such demand and suspension occurred only after Contestant's counsel had refused to allow the deposition to be taken based upon the other grounds above. Despite the suspension

under Section 2019(d), no motion for an order under that section was ever made by Contestant or his counsel. Such failure to make such motion shows that such grounds were urged solely to prevent the deposition from commencing.

The refusal of Contestant to answer any questions at the deposition was discussed by Contestant with his counsel during a recess and Contestant persisted in his refusal to answer such questions after such recess. Contestant refused to answer questions at the deposition and the acts of him and his counsel in connection therewith were a part of the scheme or plan which was preconceived by Contestant and actively pursued by him with the intent of preventing Defendants from obtaining any discovery prior to trial or forcing Defendants to go to trial without discovery.

30. On September 3 Defendants' Motion to Produce Documents was taken under submission after argument by counsel for Defendants and Contestant. Proper notice of this hearing had been duly given.

31. On September 10, the Court ordered Contestant to produce designated documents and a phonograph record of the voice of Decedent for inspection by Defendants at the office of Contestant's attorney on September 16 at 1:00 p.m. Such Order was signed, filed and served on Contestant's counsel's office on the same day.

On September 15 a Petition for a writ of prohibition was filed with the District Court of Appeal by Contestant to review the Order requiring the production of documents. This Petition was denied by the District Court of Appeal on September 16. Contestant filed such Petition to hinder and delay Defendants' efforts at discovery.

On September 16 Defendants' counsel appeared at the office of Contestant's attorney for the production of documents pursuant to the Order of September 10. Contestant failed then,

and continues to fail, to produce any of the specified documents or phonograph record. Contestant admitted in his December, 1963, deposition that the designated documents and such record were in existence and in his possession. Contestant has made no representation to the Court or to Defendants which, if any, of the documents he is unable to produce. Contestant has not offered any excuse to the Court or to Defendants for his refusal to produce such record and all or any of the documents, nor has he offered at any time to produce any of them.

Neither on September 16, the time set for production, nor subsequent thereto, has there been outstanding an order of this Court staying its Order to Produce Documents pending a decision in the District Court of Appeal or otherwise, or granting a protective order with reference thereto. Contestant's refusal to produce such record and all or any of the designated documents was willful and a part of the scheme or plan preconceived by Contestant and actively pursued by him with the intent of preventing Defendants from obtaining any discovery prior to trial or forcing Defendants to go to trial without discovery.

32. On September 10 notice of taking the deposition of Contestant on September 20 was served by Defendants upon both Contestant and his attorney. On September 20 the deposition of Contestant was convened at 9:30 a.m. The file does not reflect that written objections by Contestant to any alleged errors or irregularities in the notice of taking deposition of September 10 were ever served on Defendants. On September 20 there was no Order of the Court, either staying the deposition, or granting a Protective Order or in any other way preventing the taking thereof. Proper notice thereof was duly given. If there is any question whether Contestant had prope. .otice or had not been the subject of an Order under Code of Civil Procedure Section 2019(b)(2), such objections were waived by the physical presence of Contestant and his counsel at the proceeding without

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raising such objections, and by his failure to serve written objections under Code of Civil Procedure Section 2021.

On September 20 Contestant and his counsel were present but Contestant refused to answer any questions as to the merits of the case at such time.

Contestant's counsel refused to permit the taking of the deposition on the ground that it was suspended because he was going to file a Petition for Hearing of the denial of his Petition for Writ of Mandate by the District Court of Appeal with the Supreme Court that afternoon. After the deposition was adjourned Contestant did file such Petition for Hearing in the Supreme Court on that day. No stay order pending decision on the Petition for Hearing was issued by this Court or the California Supreme Court prior to the deposition or at any time. Contestant adopted this ground in order to prevent the deposition from commencing and proceeding and filed such Petition in an effort to hinder and delay Defendants' efforts at discovery. Such Petition was denied by the Supreme Court on October 7.

The acts of Contestant and his counsel at the deposition proceeding were a part of the scheme or plan which was preconceived by Contestant and actively pursued by him with the intent of preventing Defendants from obtaining any discovery prior to trial or forcing Defendants to go to trial without discovery.

33. The discovery attempted to be obtained from Contestant by Defendants by means of interrogatories, depositions and production of documents was reasonably necessary to the defense of the action.

34. Contestant refused and willfully refused to obey an Order of this Court that his deposition be taken on September 1.

35. Contestant willfully refused to answer any questions as to the merits of the case at his deposition on September 1.

36. Contestant willfully refused to answer any questions as to the merits of the case at his deposition on September 20.

37. Contestant willfully failed to serve and file any answers to interrogatories prior to the filing of the Motion to dismiss and willfully failed to file responsive answers thereto at any time.

38. Contestant refused and willfully refused to obey an Order of this Court compelling him to produce documents.

39. Contestant's failure properly to comply with the discovery sought from him deprived Defendants of a full and fair opportunity to prepare their defenses and would have deprived this Court of evidence indispensable to a proper adjudication of the issues.

The Court has made certain express Findings of Fact hereinabove. The making of such express Findings shall not be deemed to exclude or negate any additional implied findings justified by the record which would be necessary or proper to support the Order made herein. To the extent that any of the above findings may contain conclusions of law, such conclusions of law shall be deemed incorporated in the Conclusions of Law hereinafter made.

CONCLUSIONS OF LAW

1. Defendants were entitled to discovery from Contestant in defense of the Amended Will Contest after Probate.

2. All notices pertaining to any discovery matters or hearings in connection therewith were given as required by law or if not so given were waived by Contestant. All rulings in any hearings pertaining to discovery in the Contest after Probate which were required to be incorporated into attorney orders were signed promptly and served on Contestant's attorney within reasonable times prior to the hearings or matters to which they related.

3. Contestant refused willfully and otherwise to obey an Order of this Court fixing the date and time for the taking of his deposition. His Amended Will Contest after Probate should be

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dismissed on that ground pursuant to Code of Civil Procedure Section 2034(b)(2)(iii).

4. Contestant willfully failed to appear at his deposition on September 1 after proper notice thereof. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(d).

5. Contestant willfully failed to appear at his deposition on September 20 after proper notice thereof. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(d).

6. Contestant willfully failed to serve and file answers to properly served interrogatories submitted under Code of Civil Procedure Section 2030. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(d).

7. Contestant refused willfully and otherwise to obey an Order of this Court made under Section 2031 of the Code of Civil Procedure. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(b)(2)(iii).

8. The facts and the conclusions of law which relate to each basis of the Order of dismissal of Contestant's after Probate Will Contest are intended to be, and are separate and distinct, and not a cumulative basis for such dismissal.

9. The Court has made certain Conclustions of Law hereinabove. Should any additional Conclusions of Law, not expressly stated, be necessary to support the Order made hereinafter and be properly supported by the Findings of Fact hereinabove, such additional Conclusions of Law are hereby made and incorporated herein. To the extent that any of the preceding Conclusions of Law may contain Findings of Fact, such Findings shall be deemed incorporated

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in the Findings of Fact hereinabove.

NOW, THEREFORE, on each of the several and distinct grounds specified in the Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Amended Will Contest after Probate herein be, and it is hereby dismissed.

DATED: December 16, 1966.

Donald R. Wright

DONALD R. WRIGHT
Judge of the Superior Court

APPENDIX 3.

Declaration of Service of Motion to Dismiss Appeals.

State of California, County of Los Angeles—ss.

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and am not a party to the within entitled action; my business address is 510 South Spring Street, Los Angeles, California 90013.

On April 24, 1967 I served the within Motion to Dismiss Appeals, together with supporting papers, on the Appellant in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Ronald H. Bonaparte, Esq.
6331 Hollywood Boulevard
Suite 706
Hollywood, California 90028

Marcellus N. Joslyn
General Delivery
Pasadena, California

Marcellus N. Joslyn
324 Morningside Drive
San Antonio, Texas

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on April 24, 1967, at Los Angeles, California.

/s/ Mimi C. Brichaux
Mimi C. Brichaux

APPENDIX 4.

Appellate Rules Involved.

California Rules of Court, Rules on Appeal.

RULE 16. SERVICE AND FILING

(a) [*Time*] In civil cases appellant's opening brief shall be served and filed within 30 days after the filing of the record in the reviewing court; respondent's brief shall be served and filed within 30 days after filing of appellant's opening brief; and appellant's reply brief, if any, shall be served and filed within 20 days after filing of respondent's brief, except that when there is a cross-appeal pursuant to rule 3 appellant's reply brief which also contains his brief as cross-respondent shall be served and filed within 30 days after filing of respondent's brief containing his brief as cross-appellant, and respondent's reply brief as cross-appellant shall be served and filed within 20 days after filing of appellant's reply brief containing his brief as cross-respondent. By stipulation filed with the reviewing court the parties may extend each of such periods for not more than 60 days, and thereafter the time may be extended only by the Chief Justice or Presiding Justice, for good cause shown. No such stipulation shall be effective unless it is filed prior to the expiration of the period sought to be extended.

RULE 17. FAILURE TO FILE BRIEF

(a) [*Opening brief*] If the appellant's opening brief is not filed within the time prescribed in subdivision (a) of rule 16, the clerk of the reviewing court shall notify the parties by mail that if the brief is not filed within 30 days after the date of mailing of the notification, the appeal will be dismissed, unless good cause

is shown for relief. If a sufficient written showing of excuse is made within such 30-day period, the Chief Justice or Presiding Justice may grant additional time to file the brief subject to such conditions as he may deem proper to impose; otherwise the appeal may be dismissed forthwith.

If the brief is not filed within the time granted by the Chief Justice or Presiding Justice, the appeal may be dismissed forthwith. If the notification is not mailed by the clerk or the appeal is not dismissed on the court's own motion, the respondent may move to dismiss the appeal.

RULE 24. DECISION OF REVIEWING COURT

(a) [*When decisions become final*] All decisions of the reviewing courts shall be filed with the clerk who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties. A decision of the Supreme Court becomes final 30 days after filing unless prior to the expiration of said 30-day period either a shorter time, or an additional period of not to exceed 30 days, is ordered by the court. A decision of a Court of Appeal becomes final as to that court 30 days after filing, except that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. When a decision of a Court of Appeal is final as to said court, it is not thereafter subject to modification by said court. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such

modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification.

RULE 27. REHEARING IN COURT RENDERING DECISION

(a) [*Power to grant rehearing*] The Supreme Court or a Court of Appeal may grant a rehearing after its own decision in any cause except the denial by a Court of Appeal of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. A rehearing may be granted on petition, as provided in subdivision (b) of this rule, or on the court's own motion, prior to but not after the time the decision becomes final therein.

(b) [*Time for filing petition*] A party seeking a rehearing either in the Court of Appeal or in the Supreme Court, must serve and file a petition therefor within 15 days after the filing of the decision.

(c) [*Time for filing answer*] An answer may be served and filed within 23 days after the filing of the decision.

(d) [*Form of petition and answer*] Insofar as practicable, the petition and answer shall conform to the provisions of rule 15.

(e) [*Determination of petition*] An order of the Supreme Court granting a rehearing shall be signed by at least four judges assenting thereto, and filed with the

clerk. If no order is made before the decision becomes final as provided in subdivision (a) of rule 24, the petition shall be deemed denied, and the clerk shall enter a notation in the register to that effect.

RULE 28. HEARING IN SUPREME COURT

(a) [*Time within which court may grant hearing*] Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition as provided in subdivision (b), may order the cause transferred to itself for hearing and decision, and within the original 30-day period the Supreme Court may for good cause extend the time not to exceed an additional 30 days.

(b) [*Time for filing petition*] A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, except that a petition may not be filed after denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. Proof shall be made of the delivery or mailing of three copies of a printed petition or a petition prepared by other process of duplication in lieu of printing or one copy of a typewritten petition to the clerk of the Court of Appeal which rendered the decision. When such copies are delivered to the clerk of the Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the clerk of the Supreme Court shall return them to the clerk of the proper Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court.

(e) [*Determination of petition*] A hearing in the Supreme Court, after decision in the Court of Appeal, may be granted by an order, signed by at least four judges assenting thereto, and filed with the clerk. The denial of a hearing may be evidenced by an order signed by the Chief Justice and filed with the clerk. If no order is made within the time specified in subdivision (a) of this rule, the petition for hearing shall be deemed denied and the clerk shall enter a notation in the register to that effect.

RULE 41. NOTICED MOTIONS IN THE REVIEWING COURT

(c) [*Failure to oppose motion*] Failure of an appellant to appear and oppose a motion to dismiss an appeal after due service of notice of motion, or to file a written opposition to the motion, may be deemed an abandonment of the appeal authorizing its dismissal. Failure of the adverse party to serve and file written opposition to any other motion may be deemed a consent to the granting of such motion.

MARCELLUS N. JOSLYN,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, AND THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, DIVISIONS TWO, THREE AND FIVE,

Respondents.

MERRITT L. JOSLYN, MARY C. PARKER CURRIVAN, RONALD MERRITT JOSLYN, JOY LOUISE MacNULTY, JOYLON DAVID JOSLYN, THEODORE NEWELL JOSLYN, CELIA ALICE PARKER, M. WESLEY PARKER, III, MARCELLUS JOSLYN PARKER, ALICE JOSLYN, WILLIAM DWIGHT JOSLYN, PENNY IRENE JOSLYN, MARCELLUS LeFEVRE JOSLYN, MARINA ELAINE JOSLYN, LOIS E. MENDENHALL, MRS. MARY R. SHOFF CAREY, ROBERT F. DOLAN, BALDO M. KRISTOVICH, Public Administrator, ILSE AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY, and ROBERT D. MacDONALD, individually and as Executor of the Last Will of MARCELLUS L. JOSLYN, Deceased,

Real Parties in Interest.

TABLE OF CASES AND AUTHORITIES CITED

Cases

	Page
Bradner v. Vasquez, 43 Cal. 2d 147, 151	4, 9
Cole v. Arkansas, 333 US 196, 92 L. ed. 644	11
DeJonge v. Oregon, 299 US 353, 81 L. ed. 278	11
Estate of Fraysher, 47 Cal. 2d 131, 135	10
Estate of Rhode, 158 Cal. App. 2d 19, 323 P. 2d 490	9
Ferrara v. La Sala, 186 Cal. App. 2d 263, 271, 42 Cal. L. Rev. 865, 13 Hast. L. Journal 2, 7 Am. Jur. 2d 106	4
Feuel v. Feuel, 23 Cal. 2d 431, 438	10
Gold v. Velkov, 133 Cal. App. 2d 622	4
Great A. & P. Tea Co. v. Supermarket Equipment Corp., 340 US 147, 153, 154 95 L. ed. 162, 167	11
Hallet v. Slaughter, 22 Cal. 2d 552, 557	14
Hovey v. Elliott, 167 US 490	14
Illinois Central R. Co. v. Norfolk & Western R. Co., 385 US 57, 17 L. ed. 2d 162	11
In re Murchison, 349 US 133	13
In re Oliver, 333 US 257, 92 L. ed. 682	13
In re Rothrock, 14 Cal. (2) 34, 39	3, 5
Irwin v. Dowd, 366 US 717, 6 L.ed. 2d 651	13
Isenberg v. Sherman, 214 Cal. 722	5
Lisenba v. California, 314 US 219, 86 L. ed. 66	6
Magee v. State Bar, 58 Cal. 2d 423, 435	4, 9
Pointer v. Texas, 380 US 400, 406	13

Page

Priester v. Citizens Nat. Bank, 131 Cal. App. 2d 314, 280 P. 2d 835 ..... 4, 9
Rader v. Thrasher, 57 Cal. 2d 244 4
Rowland v. Kreyenhagen, 24 Cal. 52 5
Sinclair v. U.S., 279 US 649, 73 L. ed. 938 13
Societe Internationale pour Participations Industrielles v. Rogers, 357 US 197 14
Thompson v. City of Louisville, 362 US 199, 4 L. ed. 2d 654 13
Toomey v. Ohio, 272 US 510 13
Trumpler v. Trumpler, 123 Cal. 248 5
Turner v. Louisiana, 379 US 466, 472, 473 13
U.S. v. E. I. DuPont de Nemours & Co., 353 US 596, 598, 1 L .ed. 1057 11
U.S. v. Mississippi Valley Generating Co., 364 U.S. 520, 5 L. ed. 2d 268 11

Authorities

Page

Code of Civil Procedure, Section 2034 ..... 7, 12

Constitution of the United States, Fifth and Fourteenth Amendments 5

IN THE

Supreme Court of the United States

October Term, 1967

No. 990

In the Matter of the Estate of
MARCELLUS LINDSEY JOSLYN, also known as MARCELLUS L. JOSLYN, and as M. L. JOSLYN,

Deceased.

MARCELLUS N. JOSLYN,

Petitioner,

vs.

MERRITT L. JOSLYN, MARY C. PARKER CURRIVAN, RONALD MERRITT JOSLYN, JOY LOUISE MacNULTY, JOYLON DAVID JOSLON, THEODORE NEWELL JOSLYN, CELIA ALICE PARKER, M. WESLEY PARKER, III, MARCELLUS JOSLYN PARKER, ALICE JOSLYN, WILLIAM DWIGHT JOSLYN, PENNY IRENE JOSLYN, MARCELLUS LeFEVRE JOSLYN, MARINA ELAINE JOSLYN, LOIS E. MENDENHALL, MRS. MARY R. SHOFF CAREY, ROBERT F. DOLAN and ROBERT D. MacDONALD, individually and as Executor of the Last Will of MARCELLUS L. JOSLYN, Deceased.

Respondents.

BALDO M. KRISTOVICH, Public Administrator, ILSE AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY,

Respondents.

MARCELLUS N. JOSLYN,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, AND THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, DIVISIONS TWO, THREE AND FIVE,

Respondents.

(Continued on page two)

MERRITT L. JOSLYN, MARY C. PARKER CURRIVAN, RONALD MERRITT JOSLYN, JOY LOUISE MacNULTY, JOYLON DAVID JOSLYN, THEODORE NEWELL JOSLYN, CELIA ALICE PARKER, M. WESLEY PARKER, III, MARCELLUS JOSLYN PARKER, ALICE JOSLYN, WILLIAM DWIGHT JOSLYN, PENNY IRENE JOSLYN, MARCELLUS LeFEVRE JOSLYN, MARINA ELAINE JOSLYN, LOIS E. MENDENHALL, MRS. MARY R. SHOFF CAREY, ROBERT F. DOLAN, BALDO M. KRISTOVICH, Public Administrator, ILSE AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY, and ROBERT D. MacDONALD, individually and as Executor of the Last Will of MARCELLUS L. JOSLYN, Deceased,

Real Parties in Interest.

PETITIONER'S REPLY TO RESPONDENT

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Counsel for respondent has, in a duplicated response to the petition for certiorari directed to the Court of Appeal, Second Appellate District, State of California in No. 990, and in No. 991 directed to the Supreme Court of California, misconceived the procedure in these cases and the remedy authorized by law. He has misstated the facts and law.

In our petition for certiorari in case No. 990, we asked this Court to grant certiorari from a denial by the Court of Appeal, Second Appellate District, State of California, of our petition to recall the remittitur

upon the grounds that court granted judgment of dismissal improvidently *upon a false suggestion and under a mistake as to the facts of the case* and acted arbitrarily and capriciously in denying an appeal from the order of the Superior Court without trial or hearing, denying petitioner herein his statutory right of a will contest. Thus its judgment of dismissal was in fact no judgment. See *In re Rothrock,* 14 Cal. (2) 34, 39.

The post probate will contest involved petitioner's father's estate, approximating $15,000,000, together with a power of appointment in his father's purported will affecting his deceased mother's estate of $2,500,000. The effect of the purported dismissal was to wipe out petitioner's interest in the will. The will under which the son was excluded from all monetary benefits and therefore was an unnatural will was drawn by a lawyer who, after ingratiating himself with decendent became executor of the estate after decedent's death and trustee of testamentary trusts by the will he drew and under its terms was financially benefitted. The purported will was executed when the decedent was 89 years old and in feeble health.

Examination of the document itself (which is photostated in the record submitted to this Court) apparently shows irregularity on its face in connection with the date on which the purported will was executed, to wit: June 29, 1962 (page 41 of Petition to Recall the Remittitur). If this irregularity is established it will nullify the will.

Under the situation herein, where the will was drawn by the lawyer-confident, the California law presumes that there has been undue influence by the lawyer in his own behalf, thus it invalidates the will, but holds the will, if not executed on the date and under the requirements of due execution under California law to be void and nugatory.

Priester v. Citizens Nat. Bank, 131 Cal. App. 2d 314, 280 P. 2d 835

Gold v. Velkov, 133 Cal. App. 2d 622

Bradner v. Vasquez, 43 Cal. 2d 147, 151

Ferrara v. La Sala, 186 Cal. App. 2d 263, 271, 42 Cal. L. Rev. 865, 13 Hast. L. Journal 2, 7 Am. Jur. 2d 106

Rader v. Thrasher, 57 Cal. 2d 244.

Such a will is also presumed to be lacking in consideration.

Rader v. Thrasher, 57 Cal. 2d 244
Magee v. State Bar, 58 Cal. 2d 423, 435.

After the California court prematurely dismissed the appeal, affirming the dismissal of the will contest, without a contested trial before a jury, the objection was raised in proceedings duly had in the California Courts that the dismissal of the will contest was without due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States

(Petition to Recall the Remittitur, page 2). The court summarily denied our motion which duly and properly and timely raised the federal questions under the Fifth and Fourteenth Amendments to the Constitution of the United States (pages 2, 8, 9, 11, 16, 19, 20, 21, 22, 23, 30, 31, 40, 53 and 56) and on our petition for hearing in the Supreme Court of California we again timely challenged the arbitrary dismissal in the Court of Appeal, affirming the dismissal of the statutory will contest as in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Petition for Writ in Supreme Court of California (R. 4, 5, 13, 15, 18, 19) Exhibit A, pp. 8-10.

The supreme Court of California arbitrarily denied a hearing of our timely petition to recall the remittitur on the ground that our rights under the federal Constitution had been denied and that it was violative of the Fourteenth Amendment to the Constitution of the United States. That court denied a hearing September 7, 1967. A petition to recall the remittitur authorized by California procedure is a direct attack on the judgments below, resulting from denial of federal Constitutional rights.

In re Rothrock, 14 Cal. 2d 34, 39
Rowland v. Kreyenhagen, 24 Cal. 52
Trumpler v. Trumpler, 123 Cal. 248
Isenberg v. Sherman, 214 Cal. 722.

In *Lisenba v. California,* 314 US 219, 86 L. ed. 66 (2 cases), the Court had before it two cases in which the constitutional questions of due process of law had first been raised in the Supreme Court of California on rehearing in one case (a direct attack on the judgment) and on habeas corpus (a collateral attack). The Court granted certiorari in both cases and the case was heard twice by this court. Mr. Justice Roberts pointed out that the Supreme Court of California had affirmed the original judgment and a rehearing granted, but no question arising under the Constitution of the United States had been raised or considered. *"In a second petition for rehearing the petitioner, for the first time, asserted that his conviction violated the Fourteenth Amendment. November 3, 1939 the Court ruled the* petition for rehearing herein is denied. This Court held that on the record that showing that on the second petition for rehearing in the Supreme Court of California the court entertained the petition and explicitly overruled each of the contentions made therein, established the jurisdiction of the United States Supreme Court to review the judgment. The Court also allowed and considered the appeal on the collateral attack by habeas corpus. (311 U.S. 222, 86 L. ed. 173)

Likewise, we here specifically raised the federal constitutional question and the denial by the court below showed that it considered the case on the federal grounds presented and overruled and denied the same.

We specifically raised the question as to the right to dismiss *a will* contest or an amended will contest provided by the California statutes, the basis of dismissal being solely alleged failure to grant discovery provided by Section 2034 of the Code of Civil Procedure and we challenged the statute, Section 2034 C.C.P.—inherently and as construed and applied in this case, as violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The issues were plain and simple. Where a state statute authorizes a contest of a will to determine the property rights flowing from a decedent. can a beneficiary (the eldest son of the decedent) be deprived of that property arbitrarily and capriciously without trial for alleged non-compliance with a so-called rule of discovery? Can his pleadings be arbitrarily stricken? Can he be deprived of a jury trial guaranteed by the constitution of his state? Does such a procedure take the petitioner's property without due process of law under the 14th Amendment to the U.S. Constitution and give it to somebody else without trial or hearing on the merits of the validity of the will?

We respectfully contend that it does and that judgment below construing Section 2034 of the Code of Civil Procedure of the State of California as authorizing and permitting the summary dismissal of the will contest and an amended will contest, without trial or

hearing, violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Respondents' statements of the factual background are incorrect. There is nothing in the will or record to show that Marcellus L. Joslyn had made any provisions through any other trusts or procedure to provide for his $15,000,000 estate which he left at the time of his death. Nothing in the will declares any such a factual situation, nor is there anything in the record before this Court that we know of that support such a statement. It is true that Alice N. Joslyn, mother of petitioner, made provisions for her son in her will and named him to be the executor of her estate and one of the testamentary trustees if others did not qualify, but some of these provisions were wiped out by the provisions in Marcellus L. Joslyn's will naming Robert D. MacDonald as successor trustee to Marcellus L. Joslyn upon Marcellus L. Joslyn's death.

How much petitioner receives or what he gets out of Alice Joslyn's estate is not before the Court in this matter and is improperly referred to in the statement.

Furthermore, counsel has quoted in Appendix 1 a declaration of Ernest Zack in support of a motion for order dismissing will contest. The deposition referred to in that exhibit was never completed or corrected or signed although respondents took five days in taking it, but it does not answer the triable issue here of whether there was undue influence and lack of consideration

on the part of the attorney drawing the will that is now before the Court, and furthermore, does not answer the issue of whether the witnesses actually observed the date of the 29th of June written in on the will, apparently altered and the "9" written over some other figure that appears underneath it, and thus invalidated the entire will, or whether there was another alteration.

In a will contest, all the petitioner's counsel would need to do would be to introduce the purported will and prove that MacDonald, the confidante, business partner and legal advisor, had written it with financial benefits to himself. Respondent admits this fact. California law would then presume undue influence and lack of consideration, a prima facie case would be made out and petitioner could even rest at this point if he wished to do so.

Estate of Rohde, 158 Cal. App. 2d 19, 323. P 2d 490

Magee v. State Bar, 58 Cal. 2d 423

The court in the *Magee* case said "Even though an attorney may be acting only to carry out the wishes of his client in drawing a will containing a gift to himself he should send the client to another lawyer when the circumstances would support an inference of wrongdoing. (58 Cal. 2d 433)

Bradner v. Vasquez, 43 Cal. 2d 147, 151

Priester v. Citizens Nat. Bank, 131 Cal. App. 2d 314.

A second matter set up in respondents' opposition is the purported findings of fact, conclusions of law and order dismissing amended will contest after probate.

Counsel would have this court believe that findings were based upon a trial and hearing. This is incorrect. The record shows that there was no trial in a true sense and no evidence upon which the alleged findings of fact were or could be based. Contrary to assertions of counsel, neither declarations nor affidavits are admissible evidence in California probate proceedings except to establish an uncontested will, or date of death.

In a contested trial petitioner would be entitled to a jury of which he was deprived here.

In the absence of statutory permission, an affidavit or declaration is not competent evidence; though made under oath, it is hearsay because there has been no opportunity to cross-examine the affiant or declarant.

Estate of Fraysher, 47 Cal. 2d 131, 135
Feuel v. Feuel, 23 Cal. 2d 431, 438.

Affidavits are allowed in evidence in California in probate proceedings only in uncontested matters. (Probate Code Sec. 329, evidence of subscribing witness; Probate Code, Sec. 1170, establishment of fact of death.)

The findings of fact, contrary to the footnote regarding findings of fact by state courts, are independ-

ently examined by this Court when a constitutional question of due process is raised to determine if there is any evidence to support the findings of fact or conclusions of law.

This Court will make its own independent examination of the evidence where there is no evidence to sustain the judgment for such judgment is void.

Cole v. Arkansas, 333 US 196, 92 L. ed. 644
DeJonge v. Oregon, 299 US 353, 81 L. ed. 278.

This Court is not precluded from making an independent determination as to legal conclusions and inferences from findings and if there is no evidence to support findings, there can be no legal conclusions or inferences.

U.S. v. Mississippi Valley Generating Co., 364 U.S. 520, 5 L. ed. 2d 268
U.S. v. E. I. DuPont de Nemours & Co., 353 US 596, 598, 1 L. ed. 2d 1057
Great A. & P. Tea Co. v. Supermarket Equipment Corp., 340 US 147, 153, 154, 95 L. ed. 162, 167.

The test of judicial review is whether there is substantial evidence on the record as a whole. If the court finds there is no substantial evidence, it will reverse the judgment.

Illinois Central R. Co. v. Norfolk & Western R. Co., 385 US 57, 17 L. ed. 2d 162.

Reviewed on the record as a whole, the petitioner's right to a trial on the merits of his will contest should be granted. There is no substantial evidence, under due process of law, with witnesses testifying and being cross-examined on the basis of which the court could make any findings whatsoever on the *amended will contest.* There is nothing to support the findings and judgment and conclusions of law.

Thus summarizing the reasons for granting the writ, the constitutional issues were timely raised in the courts of California, in the Court of Appeal and in the Supreme Court, and that court denied the claim of violation of rights of due process of law under the Constitution of the United States and the challenge to the constitutionality of Section 2034 of the Code of Civil Procedure, inherently and as construed and applied in this case, as violative of the Fourteenth Amendment to the Constitution of the United States.

The petition for certiorari was timely filed in this Court within the time allowed by law and the extension granted by Justice Douglas.

The petitioner has been denied his day in court (a law which hears before it condemns) on a will contest involving a $15,000,000 estate of his father from which he and his brothers and sisters were unnaturally excluded from any monetary benefits and given a few pieces of bric-a-brac and other non-essential furniture. The lawyer who drew the will for this 89-year old ill

father personally benefitted and will benefit under it and the will was therefore presumptively the product of undue influence and lack of consideration. Examination of the document exhibits an infirmity as to the date inserted into it which may make the document void on trial.

The decision of the state court on the recall of the remittitur was based on federal grounds, adequately raised therein, which federal grounds were considered and denied. The constitutionality under the federal Constitution was fully and adequately presented and acted upon by the Court of Appeal and the Supreme Court of California. The procedure and proceedings was special, partial and arbitrary and a denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

A trial without evidence presented from the witness stand and subject to cross-examination is in fact no trial and is a denial of due process of law. The findings are, therefore, a sham and a nullity.

In re Oliver, 333 US 257, 92 L. ed. 682
In re Murchison, 349 US 133
Turner v. Louisiana, 379 US 466, 472, 473
Irwin v. Dowd, 366 US 717, 6 L. ed. 2d 651
Sinclair v. U.S., 279 US 649, 73 L.ed. 938
Thompson v. City of Louisville, 362 US 199, 4 L. ed. 2d 654
Pointer v. Texas, 380 US 400, 406
Toomey v. Ohio, 272 US 510.

Where there has been no fair adversary trial, the judgment must be vacated.

Hallett v. Slaughter, 22 Cal. 2d 552, 557.

This Court has recently, in different opinions, again expressed its view that there should be a trial on the merits. Mr. Justice Black, in various opinions, has expressed alarm over the summary procedure which is being practiced, denying litigants their day in court. We have brought this out in our opening brief and cited the leading authorities of *Hovey v. Elliott,* 167 US 490, and *Societe Internatiale pour Participations Industrielles v. Rogers,* 357 US 197, and Mr. Justice Black's views expressed in connection with the Federal Rules of Criminal and Civil Procedure recently promulgated.

Petitioner's case and cases cited in our petition may easily rest upon the unnatural will itself and the presumption of undue influence and lack of consideration of the attorney who drew the document making himself executor and trustee and thus principal financial beneficiary under the will of Marcellus L. Joslyn and also successor trustee under the Alice Joslyn estate. The burden, therefore, of going forward is upon him on the face of the record, not upon petitioner.

Furthermore, petitioner seeks a right to establish the validity or invalidity of the writing of the will and all surrounding circumstances. It does not behoove him to try his case outside of trial and thus to have two trials of the issue. He seeks but a single trial under the

statutes of California which authorize a will contest before a jury to a relative and eldest son, who is excluded from financial benefits of his father's large estate and will by an interloper, who has placed himself in a position of trust and confidence in the affairs of an elderly and ill man.

Contrary to respondents' contentions, petitioner has not been heard on the merits of the will contest, undue influences upon his aged father before the will was drafted irregularity in the date of execution, lack of competent witnesses regarding the will and its execution. If respondents really wish to give him an opportunity to be heard on the merits, as he is entitled to by California law, by a jury of his peers, they will stipulate to the granting of certiarari and the reversing of the judgment below, so that he may have a fair trial on the merits of his contest before a fair jury and fair judge.

We pray for certiorari.

Respectfully submitted,

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